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Supreme Court of the United States

(October Term 1921 No. 792.)

October Term, 1922.

No. 292.

UNITED STATES TRUST COMPANY OF NEW YORK, as Ancillary Administrator of Frederick Wesche, deceased,

Appellant,

vs.

THOMAS W. MILLER, as Alien Property Custodian,

Appellee.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 292

UNITED STATES TRUST COMPANY OF NEW YORK as Ancillary Administrator of Frederick Wesche, deceased,

Appellant,

vs.

THOMAS W. MILLER, as Alien Property Custodian.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal direct to this Court from a decree of the District Court refusing leave to the appellant Wesche to intervene in an equity proceeding instituted by the Custodian, in September, 1920, by petition, seeking expressly "in the alternative" delivery to the Custodian of separate property belonging to this appellant, who admittedly was not at any time an enemy or ally of enemy (Record, p. 146). The District Court, months after peace had been declared, denied Wesche's petition to intervene, and awarded con-

veyance and delivery of what was admittedly his separate property to the Custodian.

The case, as will be seen, differs radically in many respects from any other case under the Trading With the Enemy Act heretofore presented.

In December, 1917, the Commercial Trust Company reported to the Custodian that it had approximately a half million dollars in cash and securities deposited with it in the joint names of Frederick Wesche and Helene J. von Schierholz under the following agreement:

> "Received, Jersey City, January 30, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed, and having a par value of five hundred and twenty-four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2% of the amount so

collected; this receipt is executed in triplicate.

COMMERCIAL TRUST COMPANY OF
NEW JERSEY
By J. W. HARDENBERGH,
President.

Attest:
(Seal) WM. J. FIELD,
Secretary.

The deposit of the bonds with the Commercial Trust Company of New Jersey and the terms upon which said Trust Company is to hold and deliver over the said bonds and to collect and pay over the interest thereon as set forth in the above receipt is hereby ratified and confirmed.

Dated February , 1913.

FR. WESCHE.
HELENE J. v. SCHIERHOLZ."
(Record, pp. 17-18.)

It reported further that Mrs. von Schierholz was an enemy resident in Plaue, in Thuringia (p. 16) and that the address of Wesche, who was specified as not an enemy, was 130 Faubourg St. Denis, Paris, France (p. 17); that both Wesche and Mrs. von Schierholz were beneficially interested in the fund and that as far as it knew they were the only persons beneficially interested therein (Record, pp. 16-19).

The Custodian took no step thereon until the following July when, without making any further investigation into the matter of the ownership of the property (although he admits that the mere addressing of a letter to Wesche at the Paris address so supplied him would have

promptly brought him full and reliable information), he determined that Mrs. von Schierholz was an enemy, and caused a demand to be served on the Commercial Trust Company for immediate transfer and delivery of *all* the property to the Custodian (pp. 45-46, 148).

The Custodian, although carefully alleging in his petition that his predecessor in office, after investigation, had determined that Mrs. von Schierholz was an enemy, abstained from making any allegation that his predecessor in office, Mr. Palmer, had either investigated or determined after investigation that the property was hers, but alleged that there had been served on the Trust Company a demand for this property (pp. 5-6) which demand contained the statement that he did, after investigation, determine that the property was hers (pp. 31-34).

Unless the contract above set forth made it hers, the Custodian had no information giving any color of justification for determination that it was hers (pp. 44-49, 146, 148, 100-105).

The Trust Company did not comply with this demand. Nothing further occurred till March 28th, 1919, when the Trust Company telegraphed the Custodian that it held "for the benefit of the said cestuis que trust" further sums aggregating over $57,000 (p. 5).

A second demand for delivery of all the property was then served on the Trust Company (pp. 6-7). The Custodian again abstains from alleging directly that he had made any investigation into the ownership of the property, or determined it after investigation; but annexes a copy of the demand served, which demand contains the statement that the Custodian determined after

investigation that the property was hers (pp. 35-38).

It was admitted that the new Custodian had made no investigation of the ownership of the property (pp. 76-77, 146, 148, 136-137).

The Trust Company again failed to make delivery of the property.

It will be noticed that these demands were both made while the Act forbade recourse by any claimant to any Court, to review any seizure thereunder by the Custodian, save the United States District Court for the district in which the claimant resided. The amendment permitting suit in the Supreme Court for the District of Columbia was added only by the Act of July 11th, 1919. And Wesche, a neutral, separate owner of part of the property, and custodian of it all, resided in Switzerland (pp. 70, 148 and 96) and Ahrenfeldt, an American citizen, separate owner of part of the property, was residing throughout the war in England, France or Switzerland (pp. 55, 148 and 108).

If, as pointed out in *Garvan* vs. *$20,000 Bonds*, 265 Fed. Rep. 477, 479, seizure under such circumstances was unconstitutional, then these mere demands did not constitute constructive capture, and even constructive capture was not completed before peace came.

Again no further steps were taken for a long time. The next step was taken on September 11th, 1920, when the Custodian filed the present petition *in equity* against the Commercial Trust Company, by which he prayed the court to

> "issue a rule directed to the said respondent "commanding it, *in the alternative,* to convey

"transfer, assign, deliver and/or pay to your "petitioner, as Alien Property Custodian, the "said money and other property, hereinbe- "fore described, with interest thereon ac- "crued; or else, upon a day and at a place "to be named in said writ to show cause, "if any there be, why the relief herein "prayed should not be granted, and for such "other and further relief as in the premises "may seem meet and just" (p. 8).

On February 21st, 1921, the Commercial Trust Company showed cause, filing an amended answer, setting out all the facts in detail, alleging that the Custodian had not made investigation, or determination after investigation; showing the separate ownership of the different parts of the property by the four different owners; that two of them, Wesche and Ahrenfeldt were not and had never been enemies or allies of enemies and were and had been resident abroad from January 1st, 1914; that the other two were both sisters of Ahrenfeldt, born American citizens, but had lost their citizenship by marrying Germans, and had acquired their interests from their father and mother, both American citizens, long before the war, and that under the amendment of June 5, 1920, of Section 9 of the Trading With the Enemy Act, they were consequently each entitled to immediate return of their property, without even making application therefor, unless the fact that they were born in France, while their parents were temporarily resident there, excluded them, an exception that was wiped out by the amendment of February 27, 1921, while the case was still being argued to the District Court (pp. 41-88).

This answer (which was substantially duplicated by Wesche's proposed answer), showed that at the time of the deposit with the Commercial Trust Company in January, 1913, the bonds and cash were owned in separate amounts by these four, but were all in charge of Wesche, who was handling them all for the respective owners (pp. 56, 109).

In January, 1913, as he was advancing in years, it was thought better to deposit the securities in the joint names of Wesche and Mrs. von Schierholz, so that in case of his death or disability she might be able to manage the securities for all instead of Wesche (pp. 56-57, 109-110, 148); but, save in the event of his death or disability, she was under agreement not to act, and never did take any part in the management of the property (pp. 72, 132, 148), of which Wesche demanded delivery from the Trust Company in July, 1920, two months before the present proceeding was commenced (pp. 74, 134-135, 148).

The cash on hand was shown to have been derived from the respective securities of the four and to be correspondingly owned (pp. 62-64, 125-128, 148).

There had been no change in the ownership of any of the property since March, 1914, save for replacement of maturing securities by others, likewise separately owned.

The whole matter was set out in detail giving the Custodian the information he should have originally sought (pp. 56-70, 148, 109-131).

At the same time, on February 21st, 1921, Wesche (as well as Ahrenfeldt) filed a petition for leave to intervene, making the same allegations as the Trust Company (pp. 95-140).

The Custodian (pp. 142-145) offered in evidence only the original report made to him by the Trust Company in December, 1917, and a letter from the Trust Company of June 4, 1918 (set out on pages 143-145) stating more directly that Mrs. von Schierholz was an enemy, and that Wesche, so far as it knew, was not, and resided in Paris, France, but containing no additional information concerning the ownership of the property. He produced no further evidence of ownership.

The Custodian then admitted that Wesche was not an enemy, and that the Custodian had never questioned the fact that he was not an enemy (pp. 146, 147); that no further investigation of the ownership of the property had ever been made than the receipt of the original report of the Commercial Trust Company and the letter (pp. 146-147). He then specifically admitted the truth of all other allegations contained in the amended answer of the Trust Company (p. 148).

These were identical with the allegations of Wesche's proposed answer (Cf. pp. 41-88 with pp. 95-140).

The Court then directed the filing of briefs by March 15th, 1921, which were submitted at that time (p. 149) and took under advisement alike the petitions for leave to intervene and that of the Custodian for transfer and delivery of the property.

On July 2nd, 1921, the Peace Resolution was passed and signed by the President.

It was not until October 22nd, 1921 (p. 221), that Judge Rellstab filed his opinions, one denying the applications for leave to intervene (pp. 152-153), the other one granting the Custodian's application for transfer to him of all the

property demanded by him irrespective of its ownership (pp. 154-162).

Ratifications of the new post-bellum treaty with Germany were exchanged on the 11th day of November, 1921.

On January 16th, 1922, the matter came on for further hearing on the application for decrees. The petitioners to intervene and the Commercial Trust Company urged that the Peace Resolution and the Treaty with Germany and the Act of February 27th, 1921, barred whatever rights the Custodian had previously had. All objections were overruled, and decrees denying leave to intervene were entered on January 16th, 1922, and final decree directing transfer and delivery of all the property to the Custodian on January 19th, 1922 (pp. 149-150).

Wesche immediately took this appeal. While Ahrenfeldt and the Commercial Trust Company each appealed to the Circuit Court of Appeals for the Third Circuit, which on August 1st, 1922, affirmed both those decrees. They have each appealed from the affirmance to this Court, those appeals presenting the same main questions as the present appeal of Wesche.

The District Court and the Circuit Court of Appeals each permitted the giving of stay bonds by the Commercial Trust Company and it still holds the property, which has never come into the actual possession of the Custodian.

The case thus differs radically from any case previously before the Court under this law in important particulars.

There was in this case no showing of probable cause to believe Wesche's property enemy property. On the contrary it was admitted that it was not such.

The Custodian did not even allege directly or show that he had determined the ownership of the property, but proceeded in equity praying, expressly "in the alternative" transfer or additional information, and such relief as might be just.

There was no actual capture and there *was no* constructive capture of Wesche's property *durante bello,* because the demands were made under a statute which forbade to him, a non-resident neutral, all right of judicial review of such seizure, and were thus without due process of law, and could not constitute constructive capture; and no subsequent requirement of delivery was made till long after peace had been declared, when capture was no longer permissible.

Even Mrs. von Schierholz, as whose the Custodian sought to claim the property, was entitled to immediate return of her property under Subdivision b)3 of Section 9 of the Trading with the Enemy Act even without application therefor. *A fortiori,* her status could not authorize the seizure or capture of Wesche's property.

If the property had been jointly held the Custodian's right of capture was limited to the enemy's interest. But the admitted separate property of Wesche he certainly had no right to take.

Even in purely possessory proceedings under the Trading With the Enemy Act the neutral owner has the right under the IV Amendment to insist that no order for seizure of his property shall be made "but upon probable cause supported by oath or affirmation"; and that before the Custodian's demand and determinations shall be effective to justify order compelling delivery of the neutral property, the Custodian must make the prior investigation required by the Statute.

Principal Questions Presented.

The principal questions presented on this appeal are briefly the following:

That even in purely possessory proceedings instituted in the Courts by the Custodian there are available defenses, such as lack of a showing of facts probable cause to believe the property enemy property; unconstitutionality of the statute in its application to the particular case; that the Custodian has failed to allege or to make a determination of the ownership predicated upon the prior investigation required by the statute; that if, for any reason, the demand were defective as a capture, it could not be completed by the Court on the strength of the Custodian's determination, but only on the facts shown as probable cause, nor in any event after peace.

That, whatever may be true of the Custodian, the Federal Courts, in view of the IV Amendment to the Constitution, may issue warrants or orders for seizure of property only on showing of facts constituting probable cause, supported by oath or affirmation; and that determination by the Custodian may not be substituted for determination by the Court, which is asked to issue the warrant, of the sufficiency of the fact to constitute probable cause.

That in the case at bar, the Custodian failed either to allege or prove that he had made investigation of the ownership of the property and determined its ownership after or on the strength of such investigation; that he failed to show any probable cause to believe the property of this appellant's testator enemy property, but on the contrary admitted that the part of the property Wesche claimed was his, and that he was not and never had been an enemy.

That the demands at bar so far as they affected the separate property of the appellant's testator were not constitutionally valid as capture because he was a non-resident neutral, to whom at the time of the demands, all review of such seizure by any Court, at any time, was absolutely prohibited; and that under the V Amendment seizure of non-enemy property under such conditions was prohibited as lacking due process of law.

That the present proceeding in equity was not *purely* possessory and varied radically from those considered by this Court in *Central Trust Co.* vs. *Garvan.*

That the lady whom the Custodian determined to be an enemy, and as whose he demanded the appellant's separate property, admittedly was an American born woman who had lost her citizenship by marrying a German, and who was entitled on the admitted facts to immediate return of her own property under Subdivision b)3, of Section 9 of the Trading With the Enemy Act, and the fact that her name was joined with that of appellant's testator as co-depositor of the cash and securities, could not in any event lend justification to seizure of his separate property.

That joint property, belonging to an enemy and a neutral, is not subject to capture in its entirety as enemy property, but only to the extent of the enemy's share, and that showing a deposit in the joint names of a neutral and an enemy with power to either or to the survivor to withdraw the property, did not afford a basis justifying determination that it was entirely enemy property.

That the right to possession of property is itself property and that the owner has a right to be heard to object that the Court shall not take the possession of his property from him

without a due showing of probable cause to believe it enemy property, especially when the statute contains no provision for damages or interest for the period of detention, in the event the seizure proves unlawful.

That neither the Joint Resolution of July 2nd, 1921, nor the Treaty with Germany of August 25th, 1921, gave or reserved or could constitutionally reserve or give any power to capture or hold any property of Wesche, after the passage of such joint resolution.

That the nature of his rights, and of the determination to be made, as to the existence of probable cause as justification for issue of a warrant to seize his property, gave the owner an absolute right to intervene and insist that such warrant should not issue save in accordance with the restrictions of the Constitution and of the statute; and refusal to allow him to intervene gave rise to a right of review upon appeal.

That the nature of the questions presented authorized direct appeal to this Court under Section 17 of the Trading With the Enemy Act and Section 238 of the Judicial Code, items 3) and 4).

That the admission by the Custodian that Wesche was not and never had been claimed to be an enemy and that a specific portion of the property he demanded was Wesche's separate property, prevented there being any probable cause to seize such separate property of Wesche, and made the issue of a warrant for its seizure based solely on the claim that Mrs. von Schierholz was an enemy, illegal and unconstitutional.

That the same consequence followed as to any other property demanded only as belonging to Mrs. von Schierholz, which it was admitted did not belong to her.

Specifications of Error.

The appellant specifies the following errors committed below:

A.

The Court below erred in refusing leave to said Frederick Wesche to intervene and interpose his proposed answer in the cause.

Such ruling involved the following further rulings on questions of law which appellant also specifies as error.

B.

1. The Court below erred in holding that it could issue a warrant or other order for the transfer or delivery of the property in question, without a showing of probable cause to believe it enemy property and subject to capture as such, supported by oath or affirmation, as required by the IV Amendment to the Constitution of the United States.

2. The Court erred in making the order and decree appealed from, for such order and decree is in conflict with the provisions of the Fourth and Fifth Amendments to the Constitution of the United States prohibiting unreasonable seizures and prohibiting deprivation of property without due process of law and prohibiting the taking of private property for public use without just compensation and is not within the provisions of any rules authorized to be made by Congress concerning captures on land or water by the provisions Sub-section 11 of Section 8 of Article I of the Constitution of the United States.

3. The Court erred in holding that the proceeding of the Custodian was a merely possessory one grounded on the previous demands Exhibits B and C of the original petition of the Custodian.

4. The Court erred in holding that the statement in the demand, Exhibit B of the petition, that the Custodian Palmer had determined the ownership of the property in question after investigation, precluded inquiry in the present proceeding as to whether the investigation required by law had been made by the Custodian prior to such determination.

5. The Court erred in holding that the statement in the demand, Exhibit C of the petition, that the Custodian Garvan had determined the ownership of the property in question after investigation, precluded inquiry in the present proceeding as to whether the investigation required by law had been made by the Custodian prior to such determination.

6. The Court erred in holding that the annexing of the document Exhibit B to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership of the property in that document described after investigation.

7. The Court erred in holding that the annexing of the document Exhibit C to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership the property in that document described after ininvestigation.

8. The Court erred in holding that, as against the petitioner for leave to intervene, a neutral resident in Switzerland throughout the period from August, 1914, till and at the presentation of his petition for leave to intervene herein, the Trading with the Enemy Act, as it stood prior to the amendment thereof by the Act of the 11th day of July, 1919, was constitutional and valid so far as to give to determinations by the Alien Property Custodian made prior to July 11th, 1919, that property owned by such petitioner for leave to intervene belonged to another person deemed an enemy by the Custodian, the effect of barring such petitioner from a right to be heard in this equity proceeding by the Custodian to secure delivery to himself of property belonging to such petitioner and in the custody of the respondent Trust Company.

9. The Court erred in holding that any demand made by the Custodian for the delivery of property belonging to an American citizen not resident within any judicial district of the United States made prior to the amendment of July 11th, 1919, of that Act had any validity or constituted due process of law.

10. The Court erred in holding that the provisions of the Trading with the Enemy Act as it existed prior to the amendment of July 11th, 1919, were constitutional and valid as against this appellant's testator (a neutral not resident at any time between August, 1914, and January 3, 1922, within any judicial district of the United States, but resident throughout said period in Switzerland), to the extent that demands thereunder made

by the Custodian for property belonging to this appellant's testator upon a determination by the Custodian made prior to July 11th, 1919, that they belonged to an enemy, could be subsequently validated and a possessory proceeding maintained based on such prior determination, by virtue of the amendment of the Trading with the Enemy Act by the Act of Congress of July 11th, 1919; and in holding that such Act of July 11th, 1919, so construed was constitutional and valid.

11. The Court erred in holding that the statement in the demand, Exhibit B of the petition, that the Custodian Palmer had determined the ownership of the property in question after investigation precluded inquiry in this present proceeding on the application of this appellant's testator (a neutral who at the time of the making of said demand was and ever since has been a resident of Switzerland, and a neutral throughout the war), as to whether the investigation required by law had been made by the Custodian prior to such pretended determination.

12. The Court erred in holding that the statement in the demand, Exhibit C of the petition that the Custodian Palmer had determined the ownership of the property in question after investigation precluded inquiry in this present proceeding on the application of this appellant's testator (a neutral who at the time of the making of said demand was and ever since had been a resident of Switzerland and a neutral throughout the war), as to whether the investigation required by law had been made by the Custodian prior to such pretended determination.

13. The Court erred in holding that the statement in Exhibit B of the original petition that the determination therein alleged had been made after investigation was tantamount to an allegation that it had been so made.

14. The Court erred in holding that the statement in Exhibit C of the original petition that the determination therein alleged had been made after investigation was tantamount to an allegation that it had been so made.

15. The Court erred in holding that the making of the determination specified in Exhibit B was not disputed.

16. The Court erred in holding that the making of the determination specified in Exhibit C was not disputed.

17. The Court erred in holding that the allegations of the proposed answer of the petitioner for leave to intervene did not state a valid defense to the proceeding.

18. The Court erred in holding that amendments of the Trading with the Enemy Act passed subsequent to the making of both of the demands set up in the petition as Exhibits B and C thereof respectively could cure the constitutional invalidity of said demands and of the Act of Congress under which they were made existing at the time they severally were made, without a new determination and demand by the Alien Property Custodian after the passage of such amendments.

19. The Court erred in holding that after the declaration of war by the United States on April

6th, 1917, the Trust Company had any power or authority to deliver any part of the property in question to Helene von Schierholz by virtue of the terms of the agreement of deposit.

20. The Court erred in holding that the Alien Property Custodian could lawfully in this proceeding assert greater rights over the property in question in the right of Mrs. von Schierholz than Mrs. von Schierholz could lawfully have done in the absence of war, in her own right.

21. The Court erred in holding that the Trust Company's report showed that under the trust agreement Mrs. von Schierholz at any time after April 6th, 1917, had a right to demand of the Trust Company that the moneys or securities in question or any thereof be turned over to her other than such as were her individual property.

22. The Court erred in holding that on the report alone Exhibit A of the petition, the Alien Property Custodian could justly determine that the properties in question were all held for an enemy, without other investigation.

23. The Court erred in holding that a determination of ownership of property by the Custodian, made without evidence to support it, with notice that it was contrary to the real ownership, with notice where exact evidence of the ownership could be obtained, and made without inquiry and without investigation of the real ownership, and in fraud of the rights of the real owner, prevents any resistance to or questioning of such determination in a court of equity by such owner or his bailee in possession of the property when the Custodian appeals to such a

court for its aid in securing delivery of the property to him; and in holding that the Trading with the Enemy Act of 1917 so construed is constitutional and not within the prohibitions of the IV and V Amendments to the Constitution of the United States.

24. The Court erred in holding that a Court of Equity should order property turned over to the Alien Property Custodian that he under undisputed facts had no lawful right to hold, without allowing to the real owner of the property any opportunity of asserting his rights thereto.

25. The Court erred in holding that the property of persons other than enemies is the subject of capture, when not in actual hostile use against the United States, or within a region where active hostilities are being conducted.

26. The Court erred in holding that property, several identifiable parts of which were owned by citizens or neutrals in severalty, and only a severable part by enemies, was subject to capture as a single item of property.

27. The Court erred in holding that a deposit of property, made years before the war was declared in the joint names of an enemy and a neutral, with stated power to either to withdraw it, was subject to capture, by virtue of that fact alone, as enemy property in its entirety, irrespective of the actual ownership of the several parts thereof, and of the several individual personal ownership by such neutral of a several part thereof, without prior investigation of the real ownership by the Custodian.

28. The Court erred in holding that where personal property had been deposited with a bailee, under an ante-bellum contract running to an enemy and a neutral with express power to either to withdraw the property from deposit, such fact alone after the declaration of war, irrespective of notice of the real ownership of the property by persons not enemies, justified a determination that the property was held for an enemy.

29. The Court erred in holding that a Court of Equity should order the property in question, or any thereof, turned over to the Alien Property Custodian as the property of Mrs. von Schierholz, when he was by law required to return to her any property of hers seized by him, without prior application by her, under and by virtue of the provisions of Section 9 of the Trading with the Enemy Act, Subdivisions b-3 and b-8 as amended by the Acts of Congress of June 5, 1920 and February 27th, 1921, she having been born a citizen of the United States, and having lost her citizenship solely by her marriage to a German subject prior to 1914, and having derived whatever rights of ownership she had in the property from her father, an American citizen, and having acquired whatever rights or powers or interests she had therein long prior to August 1st, 1914.

30. The Court erred in refusing to consider any of the objections specified in and by the proposed answer of the petitioner for intervention Wesche to the relief prayed by the Alien Property Custodian.

31. The Court erred in refusing to find that at the time of each of the demands set forth in the petition as Exhibits B and C thereof respec-

tively the provisions of Sec. 7 of the Trading with the Enemy Act were unconstitutional and invalid as far as they ordered the seizure or capture by the Custodian of the property of a neutral not resident within any judicial district of the United States such as was the petitioner, appellant's testator.

32. The Court erred in refusing to hold the demand set forth in the original petition as Exhibit B thereof void as not constituting due process of law.

33. The Court erred in refusing to hold the demand set forth in the original petition as Exhibit C thereof void as not constituting due process of law.

33a. The Court erred in failing to hold the provisions of the Trading with the Enemy Act, authorizing seizure by the Alien Property Custodian of money or property not belonging to enemies or allies of enemies and aid of the Courts in securing delivery of such property to him, unconstitutional in the absence of provision for payment of either interest or damages for the period of detention of such property before return.

34. The Court erred in holding that the amendment of the Trading with the Enemy Act by the Act of July 11th, 1919, passed after the demands made and after any pretended determination of ownership by the Custodian (whether with or without prior investigation) but prior to the institution of this proceeding in equity, by the Custodian, cured any original invalidity in such demands, and authorized award of the possession

of the property in question to the Alien Property Custodian on the petition here, which contains no allegation of any subsequent determination of the ownership by the Alien Property Custodian, without investigation by the Court of the claims of ownership to part of the property of this petitioner for intervention.

35. The Court erred in holding that the Amendatory Act of Congress of July 11th, 1919, amending the Trading with the Enemy Act (as construed by the Court as validating a demand by the Custodian, for property of a neutral, made before the passage of such amending act and rendering it conclusive in this proceeding against the rights of a neutral owner of the property demanded) was constitutional and valid and not within the prohibitions of the V Amendment to the Constitution of the United States forbidding depriving any person of his property without due process of law.

36. The Court erred in holding that an amendment of the Trading with the Enemy Act, enacted by Congress subsequent to the making of both the demands sets up in the petition, as Exhibits B and C thereof, could cure a constitutional invalidity of the Trading with the Enemy Act as it existed at the time the said demands severally were made, and validate such prior demands and pretended determinations, without a new determination and demand made by the Alien Property Custodian according to law after the passage of such amendment; and in holding that such amendment could constitutionally have such effect in spite of the provisions of the V Amendment to the United States Constitution.

37. The Court erred in holding that the question whether Wesche had any title or interest in the moneys or securities which were the subject of the original petition herein could be raised only by his filing a claim and instituting proceedings as provided by Section 9 of the Trading with the Enemy Act.

38. The Court erred in holding that a Court of Equity cannot in a proceeding like the present consider the rights of claimants to the property which was the subject of the proceeding as a condition of granting relief to the original petitioner.

39. The Court erred in holding that a Court of Equity will entertain a purely possessory proceeding without regard to the equities and rights of the owners of the property.

40. The Court erred in holding that the Alien Property Custodian did not by applying to a Court of Equity for relief waive the right to obtain possessory award otherwise than upon equitable considerations and conditions.

41. The Court erred in holding that the Custodian was entitled to relief from the Equity Court of a possessory award of the property without meeting the requirements of equity as to doing equity.

42. The Court erred in holding that it could direct a delivery to the Custodian as successor to the right of Mrs. von. Schierholz which it would have been a breach of trust for her to demand.

43. The Court erred in holding that after the declaration of war by the United States on April

6, 1917, the Trust Company had any power or authority to deliver the property in question (other than so much thereof as was individually owned by her) to Helene von Schierholz by virtue of the terms of the agreement of deposit.

44. The Court erred in failing to hold that the petitioner, the Custodian (by instituting his proceeding in equity by order to show cause, if any there be, why the property should not be turned over and assigned to the Custodian and by omitting from his petition any allegations that he had, after investigation thereof, determined the ownership of the property in question) had sought a determination by the Court of the ownership of the property after hearing the evidence of persons interested concerning such ownership, and had thereby opened the door for the allowance of the petition of this appellant's testator for leave to intervene and set up his rights of ownership in the property and for a determination thereon.

45. The Court erred in holding that the refusal to permit this appellant's testator to intervene was not in conflict with the provisions of the V Amendment to the Constitution of the United States providing that no person shall be deprived of property without due process of law.

46. The Court erred in holding that the Trading with the Enemy Act in so far as it authorized seizure of private property, not in use in hostility to the United States and not within any area of actual hostilities, belonging to this appellant's testator who was not an enemy of the United States but a neutral who did not reside in any judicial

district of the United States, was, prior to the amendment of July 11th, 1919, constitutional and valid.

47. The Court erred in holding that a Court of Equity would give its assistance to the Alien Property Custodian by requiring property to be turned over to him as the property of Mrs. von Schierholz at a time when surrender to her by him even without prior application by her, of all property belonging to her, was, on the undisputed facts, provided for by law, and in refusing to permit this appellant's testator to intervene under such circumstances to assert his own claim to the property.

48. The Court erred in holding that a Court of Equity should order property turned over to the Alien Property Custodian that he on the conceded facts had no lawful right to hold, and with no probable cause shown to believe it enemy property.

49. The Court erred in failing to hold that the petitioner had not alleged that any determination of the ownership of the property had been made by either Mr. Palmer or by Mr. Garvan as Alien Property Custodian after investigation.

50. The Court erred in holding the original petition of the Custodian sufficient to entitle such petitioner to relief otherwise than in accordance with the actual ownership of the property and without allowing this appellant's testator leave to intervene to do so and present his claims to the property.

51. The Court erred in holding that this defendant could be deprived of his property without due process of law, and that an order for delivery could be made without a showing of probable cause to believe it enemy property.

52. The Court erred in holding that the demand of the Alien Property Custodian Palmer (Exhibit B of the original petition) constituted due process of law.

53. The Court erred in holding that the demand of the Alien Property Custodian Garvan (Exhibit C of the original petition) constituted due process of law.

54. The Court erred in refusing to find that at the time of each of the demands set forth in the petition as Exhibits B and C thereof respectively the provisions of Section 7 of the Trading with the Enemy Act were unconstitutional and invalid so far as they authorized the seizure by the Custodian of property of American citizens not resident in any judicial district of the United States and not enemies or allies of enemies, or of neutrals not resident within any judicial district of the United States, such as Charles J. Ahrenfeldt and Frederick Wesche were respectively admitted to be.

55. The Court erred in failing to hold that upon Wesche's application for leave to intervene all matters of fact alleged by him in his proposed answer annexed to his petition must be deemed true.

56. The Court erred in holding that a Court of Equity was bound to exercise its special pow-

ers in favor of the Alien Property Custodian contrary to the real and equitable rights of this appellant's testator, refusing him leave to intervene and without allowing him to be heard.

57. The Court erred in holding constitutional and valid the provisions of the Trading with the Enemy Act which authorize seizure by the Custodian of private property belonging to persons not enemies and which was not in actual military use against the United States or within any area of actual hostilities as against the petitioner for leave to intervene, who was a neutral and had not been resident within any judicial district of the United States at any time since January 1st, 1914.

58. The Court erred in holding that the demand Exhibit B of the petition was a lawful exercise of the right of capture under Clause 11 of Section 8 of Article I of the Constitution of the United States.

59. The Court erred in holding that the demand Exhibit C of the petition was a lawful exercise of the right of capture under Clause 11 of Section 8 of Article I of the Constitution of the United States.

60. The Court erred in holding that the provisions of Section 7 of the Trading with the Enemy Act, prior to the amendment of July 11th, 1919, were, so far as they authorized the seizure or capture of property belonging to persons not enemies or allies of enemies of the United States and not resident within any judicial district of the United States, a valid exercise of the power "to make rules concerning captures on land and

water" conferred by Clause 11 of Section 8 of Article I of the Constitution of the United States; and not in conflict with the prohibitions contained in the IV and V Amendments to the United States Constitution.

61. The Court erred in holding that a purely possessory proceeding could be maintained by the Alien Property Custodian under the provisions of the Trading with the Enemy Act and the amendments thereof to obtain possession of property not actually belonging to an enemy or ally of enemy and not in use in hostility to the United States in the absence of an actual determination (after investigation) by the Custodian, authorized by law at the time it was made, of the ownership of such property, on the ground that the Custodian might have made such a determination on the papers submitted to him.

62. The Court erred in holding that the right of capture or seizure, in the case of property owned in severalty, part by one not an enemy or ally of enemy of the United States, and part by an enemy, could notwithstanding the prohibitions of the V Amendment to the Constitution of the United States extend beyond the part or share belonging to the enemy.

63. The Court erred in ruling that under the trust agreement either Mrs. von Schierholz or Wesche could demand the possession of the properties therein covered.

64. The Court erred in holding that it was the duty of the Trust Company to comply with the demands of the Alien Property Custodian and

turn over all the property demanded to him, and that this appellant's testator had no right to be heard.

65. The Court erred in holding that the question of other persons' ownership or interest in the properties demanded was irrelevant in this proceeding.

66. The Court erred in holding that no questions arising out of the rights of the appellant Wesche in and to property which was the subject of the proceeding can be raised save after the demands of the Alien Property Custodian, Exhibits B and C, have been complied with and then only by instituting proceedings authorized by Section 9 of the Trading with the Enemy Act as amended.

67. The Court erred in awarding custody of the property or any thereof as the property of Helene von Schierholz to the Alien Property Custodian after the enactment of the Act of Congress of February 27th, 1921, amending the Trading with the Enemy Act, without hearing this appellant and without probable cause shown to believe it enemy property.

68. The Court erred in awarding custody of the property of this appellant or any thereof to the Alien Property Custodian after the declaration of peace with Germany, and after the exchange of ratifications of the treaty of peace.

69. The Court erred in holding that this proceeding was a possessory one, when the demands Exhibits B and C of the original petition were both void because made under a statute which

was unconstitutional, at the time they were made, as to the owners of parts of the property involved, to-wit, this appellant's testator Frederick Wesche, a neutral resident at all times since 1914 in Switzerland and Charles J. Ahrenfeldt (whose property had been entrusted to this appellant's testator by him), an American citizen resident at the times when said demands were each made in London, as providing for seizure of property of persons not enemies without due process of law.

70. The Court erred in holding that the Custodian could dispense with the duty of investigation before determination by him of ownership of property under the provisions of the Trading with the Enemy Act, and in holding that the Trading with the Enemy Act so construed was constitutional in so far as it authorized capture or seizure of property not owned by an enemy or ally of enemy and not in actual hostile use against the United States or within a region where hostilities were being actively conducted, and that it was not, so construed, in such cases, in conflict with the provisions of either the IV or V Amendments to the United States Constitution.

71. The Court erred in holding that a Court of Equity was bound to exercise its special powers in favor of the Alien Property Custodian in this proceeding without hearing this appellant's testator or considering his rights or the invalidity of the asserted proceedings or the constitutionality of the provisions of the Trading with the Enemy Act of October, 1917, authorizing seizure of the private property of this appellant's testator a neutral and not an emey or ally of enemy, not residing within any judicial district of the United

States, and to whom all opportunity of revision of any such seizure in any Court was expressly refused.

72. The Court erred in holding constitutional and valid the provisions of the Trading with the Enemy Act which authorize seizure by the Custodian of private property belonging to persons not enemies or allies of enemies and which was not in actual military use against the United States or within any area of actual hostilities.

73. The Court erred in directing delivery, after the proclamation of peace and ratification of the treaty of peace of the property of this appellant's testator to the Alien Property Custodian under demands or determinations made by the Custodian prior to July 11th, 1919.

74. The Court erred in directing delivery to the Alien Property Custodian in this proceeding of any property which was admittedly not the property of Helene J. von Schierholz and had not been.

75. The Court erred in holding that the Act of Congress of July 11th, 1919, could constitutionally (and in disregard of the V Amendment of the Constitution of the United States) operate, retroactively, to validate provisions of the Trading with the Enemy Act of October 6th, 1917, unconstitutional when adopted, as of a time prior to the enactment of such amendment and to validate acts attempted to be done under such unconstitutional provisions prior to the enactment of such Act of July 11th, 1919.

76. The Court erred in holding that the right of capture or seizure, in the case of property

owned in severalty, part by one not an enemy or ally of enemy of the United States, and part by an enemy, could extend beyond the part or share belonging to the enemy.

77. The Court erred in holding the Trading with the Enemy Act constitutional in so far as it permitted capture or seizure of property on land not belonging to an enemy or ally of enemy, and not in use against the United States, and not within any region in which hostilities were being actively conducted.

78. The Court erred in holding that it was the duty of the Trust Company to comply with the demands of the Alien Property Custodian and turn over all the property demanded to him.

79. The Court erred in holding that, after the passage of the joint resolution of Congress declaring the state of war between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, the Alien Property Custodian had any power, right or authority to reduce to his possession as such Custodian by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such Custodian, other than property actually belonging to the Imperial German Government, or its successor or successors or to German Nationals.

80. The Court erred in holding that after the signature and ratification of the treaty with Germany of date August 25th, 1921, and the exchange

of ratifications thereof between the two governments, the Enemy Property Custodian had any power, right or authority to reduce to his possession as such Custodian, by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such Custodian, other than property actually belonging to the Imperial German Government, its successor or successors, or to German Nationals.

81. The Court erred in failing to hold that, after the passage of the joint resolution of Congress declaring the state of war between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, and the proclamation of peace by the President of the United States, and the signature and ratification of the treaty of peace between the United States and Germany of date August 25th, 1921, and the exchange of ratifications of such treaty, the Alien Property Custodian could not, by virtue of determination of enemy ownership of property by him and demand thereof accordingly, maintain any possessory proceeding by virtue of the Trading with the Enemy Act and the amendments thereof, to reduce to his possession as Alien Property Custodian any property, so previously demanded by him as property of German enemies of the United States, unless such property had actually belonged either to the Imperial German Government, or its successor or successors, or to German Nationals.

82. The Court erred in failing to hold that upon the termination of the war all right of cap-

ture or seizure under the provisions of the Trading with the Enemy Act and all right of completing capture or seizure attempted by demand of the property but not theretofore completed by actual reduction of the property to possession by the Custodian ceased and determined save and except only as to such property as was specifically excepted by the terms of the peace resolution of July 2nd, 1921, and by those of the treaty of peace with Germany of August 25th, 1921, namely, all property of the Imperial German Government, or its successor or successors, and of all German Nationals which had been the subject of a demand, and all property of the Imperial and Royal Austro-Hungarian government or its successor or successors and of all Austro-Hungarian Nationals, which had been the subject of such demand; and in failing to hold that, it appearing that part of the property herein sought to be recovered was not of such excepted character, no possession could be herein awarded to the Custodian of such property which did not and had not belonged to said Governments or any of them or to German or Austro-Hungarian Nationals.

83. The Court erred in refusing to hold that the amendment of the Trading with the Enemy Act by the Act of July 11th, 1919 (as construed by it, as validating determinations and demands made by the Custodian prior to the enactment of such amendment as to which the provisions of the Trading with the Enemy Act as previously existent were unconstitutional) was invalid and unconstitutional, as in conflict respectively with the provisions of the Constitution of the United States; to wit, those of the Fifth Amendment to the Constitution of the United States, forbidding

that any person be deprived of property without due process of law, and those forbidding the taking of private property for public use without just compensation and in conflict with the provisions of the Fourth Amendment to the Constitution of the United States forbidding unreasonable seizures.

84. The Court erred in holding that this proceeding was a possessory one, when the demands Exhibits B and C of the original petition were both void because made under a statute which was unconstitutional at the time they were made as to the owners of parts of the property involved, to wit, Frederick Wesche, a neutral resident at all times since 1914 in Switzerland and Charles J. Ahrenfeldt, an American citizen resident, at the times when said demands were each made and since, outside of the United States in England, in France and in Switzerland, as providing for seizure of property of persons not enemies without due process of law.

85. The Court erred in making the order and decree directing the Commercial Trust Company of New Jersey, respondent in the original proceeding, forhwith to account for, convey, transfer, assign, deliver and pay to Thomas W. Miller as Alien Property Custodian the money and other property described and set forth in the petition of the Alien Property Custodian and as modified by the amended answer with any accretions thereon or changes therein, without first hearing and determining the claims and rights of the petitioner, Frederick Wesche to the same or parts thereof.

86. The Court erred in holding that a capture or seizure by the Custodian was completely effected of the property here in question before the exchange of ratifications of the treaty of peace, by the demands shown and the institution of this proceeding, without the actual reduction to his possession of the property or any part thereof.

87. The Court erred in holding that the stipulation in the treaty of August 25th, 1921, between the United States and Germany according to the United States the benefit of the provision in the joint resolution of Congress of July 2d, 1921, that all property of all German Nationals which had been the subject of a demand by the United States of America or of any of its officers, agents or employees should be retained by the United States of America and no disposition thereof made except as specifically provided by law, was (as construed by the Court as applicable to property of individual German Nationals, which had been merely made the subject of a demand or demands by the Alien Property Custodian without actual reduction to possession or physical capture) constitutional and valid and not within the prohibitions of the V Amendment to the Constitution of the United States.

88. The Court erred in holding that the Joint resolution of Congress of July 2d, 1921, in so far as it authorized completion of uncompleted captures or seizures of private property after the conclusion of peace and the exchange of ratifications of the treaty of August 25th, 1921, was constitutional and valid and not within the provisions of the V Amendment to the Constitution of the United States forbidding that any person shall be

deprived of his property without due process of law, and forbidding the taking of private property for public use without just compensation.

89. The Court erred in holding that the Trading with the Enemy Act, and the Amendments thereof, the Joint Resolution of Congress of July 2d, 1921, the Proclamation of Peace by the President of the United States, and the treaty of August 25th, 1921, and the exchange of ratifications thereof, all and severally, were constitutional and not within the prohibitions of the V Amendment to the Constitution of the United States forbidding the taking of private property for public use without just compensation, and forbidding that any person should be deprived of his property without due process of law, as the same were construed by the Court as authorizing completion (as against individual owners), after the conclusion of peace, of captures or seizures by the Custodian of private property individually owned, not previously reduced to actual possession by him.

90. The Court erred in assisting a capture or seizure of individually owned private property by the Custodian after the conclusion of peace.

91. The Court erred in assisting a capture or seizure of individual private property, belonging to an American citizen, by the Custodian, after the conclusion of peace.

92. The Court erred in assisting a capture or seizure of individual private property belonging to one never an enemy or ally of an enemy, by the Custodian after the conclusion of peace.

93. The Court erred in refusing leave to this appellant to intervene and assert his rights to the property in question in this proceeding when it appeared that Helene J. von Schierholz, over whose rights alone the Custodian asserted any claim, was born a citizen of the United States and lost her citizenship solely by her marriage to a German subject prior to 1914, and that all rights of ownership she had in the property in question she had derived from her father, an American citizen, and long prior to August 1st, 1914.

94. The Court erred in holding that after the conclusion of the treaty of peace, the Alien Property Custodian was authorized to prosecute any proceeding for the purpose of reducing to his possession property not actually so reduced to possession prior to the conclusion of peace.

94a. The Court erred in failing to hold that the provisions of the Trading with the Enemy Act authorizing purely possessory proceedings by the Alien Property Custodian to recover possession of property which he had required to be delivered to him as enemy property, had become unconstitutional with the termination of the war.

95. The Court erred in holding that it had any jurisdiction to entertain a purely possessory proceeding by the Custodian after the conclusion of peace.

BRIEF OF THE ARGUMENT.

But a single ruling was made on the petitioner Wesche's petition for leave to intervene in this Equity proceeding, namely, its denial; but that ruling involved passing on many different questions of law.

The argument of this appeal divides itself naturally between five principal subjects, as follows:

A. Proceedings by the Custodian, under Section 17 of the Trading With the Enemy Act, even of purely possessory character, are subject to valid defenses.

B. The facts in the present case showed ample cause for refusal of the relief sought by the Custodian.

C. Wesche was entitled to intervene and raise such defenses.

D. Appeal lay direct to this court from the decree refusing him leave to intervene.

E. No previous decisions of this court cover the questions presented on this record.

A.

Proceedings by the Custodian under Section 17 of the Trading With the Enemy Act, even of purely possessory character, are subject to valid defenses.

POINT I.

The provisions for appeal in proceedings brought by the Custodian under this section necessarily imply that there may be valid defenses to any such proceedings.

Section 17 of the Trading With the Enemy Act, which gives the Custodian the right to ask the aid of the Courts, itself provides for appeals as provided in sections 128 and 238 of the Judicial Code—that is, the broad right of review given in ordinary civil cases. Congress thus clearly declared an intention that the Courts should aid the Custodian only *on a proper judicial showing.* A showing of probable cause for seizure is also a Constitutional prerequisite of any summary seizure by judicial process. (Vide, Point II.)

POINT II.

If purely possessory in character the Custodian's proceeding is an application for a warrant and no warrant may issue but upon a showing of facts constituting probable cause, supported by oath or affirmation.

This Court has already pointed out that a purely possessory proceeding by the Custodian is in substance a mere application for a warrant.

Central Trust Co. vs. *Garvan,* 254 U. S. 554.

The IV Amendment to the Constitution provides:

> "No warrant for the seizure of person or "property shall issue but upon probable cause "supported by oath or affirmation."

This is a limitation on the power of the Courts, and on the power of Congress to confer power on the Courts. If Section 17 be construed to override this fundamental provision it becomes itself unconstitutional. These limitations are binding in war as well as in peace and limit the war-powers of Congress and of the Government.

> *United States* vs. *Cohen Grocery Co.*, 255 U. S. 81, 88;
> *Ex parte Milligan*, 4 Wall. 2, 118-120;
> *Miller* vs. *United States*, 11 Wall. 268, 317;
> *Tyler* vs. *Defrees*, 11 Wall. 331.

Nor may assertion of the statutory determination "after investigation" by the Custodian, be substituted for the showing of the facts supposed to constitute probable cause, to be passed on, as to their sufficiency, by the court which is asked to issue the warrant.

> "The oath in writing should state the facts "from which *the officer issuing the warrant* "may determine the existence of probable "cause, or there should be a hearing by him "with that purpose in view. The immunity "guaranteed by the Constitution should not "be lightly set aside by a mere general de- "claration of a non-judicial officer that he has "reason to believe and does believe, etc.

"The undisclosed reason may fall far short "of probable cause."

Ripper vs. *United States,* 178 Fed. Rep. 24, 26.

To like effect are the following cases arising under similar express provisions of statute, which, by their terms, dispensed with showing the facts constituting probable cause, when a Federal officer made affidavit that he had determined that probable cause existed.

Veeder vs. *United States,* 252 Fed. Rep. 414, 420;

United States vs. *Pitotto,* 267 Fed. Rep. 603;

United States vs. *Rykowski,* 267 Fed. Rep. 866.

See also:

24 Opinions Atty.-Gen., 685, 688.

Whether the Custodian could constitutionally under this Statue, lawfully take by the strong hand is a separate question. This Court, in *Central Trust Co.* vs. *Garvan,* gave a dictum that he could. It does not seem to have had under consideration at the moment the provisions of the IV Amendment. But, the fact, if fact it be, that the Congress may authorize some other civilian officer to capture with the strong hand, affords no ground for saying that it may give powers to Courts to issue warrants which the Constitution expressly and in terms prohibits.

We contend elsewhere (Point XI) that the present proceeding was not a "purely possessory"

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proceeding like those considered in *Central Trust Company* vs. *Garvan*. If it was not such, the appellant is clearly entitled to reversal. But, if the proceeding is a "purely possessory" one, then the application however disguised, by whatever nomenclature or form of words, is nothing but an application for a warrant of seizure. Constitutional prohibitions may not be so evaded by mere forms of words. Moreover, in this case the constitutional prohibition referred to is amplified by the additional phrase: "The right of the "people to be secure in their * * * effects "against unreasonable seizures shall not be vio- "lated." (IV Amendment.)

POINT III.

Unconstitutionality of the statute or of seizure under it, as applicable to a particular case, may be asserted as a defense.

In the case of *Central Trust Co.* vs. *Garvan*, 254 U. S. 554, this Court held that the Act, *as it stood in relation to the demands there presented*, was constitutional, pointing out that it provided an adequate remedy for every person whose property was seized by the Custodian, by a suit under Section 9.

In so doing the Court seems to have substantially approved the statement made in the same case in the Circuit Court of Appeals:

> "If persons not alien enemies or allies "of alien enemies were given no means to

"protect their interests in such property the "seizure would be unconstitutional as with-"out due process of law."

Garvan vs. *$20,000 Bonds,* 265 Fed. Rep. 477, 479.

The Circuit Court of Appeals there went on, as did this Court, to point out that remedy was afforded by suit under Section 9.

But neither Court seems to have observed that, until the amendment of July 11, 1919, no neutrals or citizens resident outside the United States could bring such suits, as the bringing of suits was until then, in terms, absolutely restricted to "the District Court of the United States for "the district in which the claimant resides."

The question did not arise in that case, and could not for there were no claimants of such character, and moreover the Court was dealing with the Act as amended in July, 1919.

The attempted seizure in this case, as we shall see, came squarely within the conditions described as unconstitutional in *Garvan* vs. *$20,000 Bonds.* All judicial review at the instance of the real owner, if a non-resident, was in terms prohibited at the time of making the determinations, demands and requirements relied on by the Custodian as the very foundation of this proceeding. The invalidity of attempted capture in such a case constituted a defense.

POINT IV.

If the Custodian's determination be offered as a substitute for the constitutional requirement of "probable cause supported by oath or affirmation," it must be shown positively, and by oath or affirmation, (and not by mere possible inference), that such determination has been made, and that all statutory prerequisites of such determination have been complied with.

If the Custodian wishes to maintain, contrary to the doctrines of *Ripper* vs. *United States,* 178 Fed. Rep. 24, 26 and the other authorities cited above under Point II, that his "determination" of enemy ownership is, under this statute, an adequate substitute for a showing of facts constituting probable cause, supported by oath or affirmation, then at least he must be required, under his own contention, to show the Court, whose assistance he seeks, in unequivocal and precise terms, that he has taken all the steps necessary to dispensing with the Constitutional guaranty.

The statutory requirement "after investigation" is not meaningless.

> *Central Trust Co.* vs. *Garvan,* 254 U. S. 554.

His determination must also be made in good faith.

> *Salamandra Ins. Co.* vs. *Trust Co.,* 254 Fed. Rep. 852, 857.

That is, it must somewhere find support in the results of the investigation. Somewhere, along the line, there must be the showing of probable cause, or these great safeguards of constitutional liberty are broken down.

It follows:

> (a) That the Custodian's quest for information must be pursued to a reasonable extent under the circumstances of the particular case.
>
> (b) That the determination must be based on and supported by information obtained.
>
> (c) That this quasi-judicial determination must be made upon the results of the investigation by an officer to whom such power of determination has been given by law.
>
> *Runkle* vs. *United States,* 122 U. S. 543.

And if no such determination has been made, or is not shown to the Court whose assistance is prayed, the required showing of facts constituting probable cause for the seizure supported by oath or affirmation may, certainly, not be dispensed with.

And if the Custodian assert a *prima facie* showing of such investigation and determination which he offers as a substitute for "probable cause," that assertion may be contradicted. Every one not an enemy is entitled to some showing of "probable cause" before his property may be seized.

If neither allegation that he has made investigation and determination thereon, nor showing of probable cause, is required of the Custodian; if he need only walk into any Federal Court and say "I have demanded this property. Issue

mandate to compel its delivery to me"; and, if the Court, even sitting in equity, is bound on such an assertion to close its eyes to all else and issue its warrant, then our judges are but mere bailiffs to do the will of this dictator, restrained only by his own moderation; and our courts, the guardians of the Constitution, are powerless themselves to obey, even less to enforce, its plainest and most emphatic guarantees, and bound to do what the IV Amendment in clear English words forbids their doing; and this although the very statute in question, by its provision for appeals, intimates unmistakably that the Courts in aiding the Custodian are to act judicially and only in conformity with law.

POINT V.

A constructive capture, if, for any reason, not completed by the mere demand of the Custodian, could not be completed by decree or issue of warrant of the Court, but upon a showing to it of facts constituting probable cause. Nor could an incomplete capture be completed after the passage and signature of the Joint Resolution of July 2nd, 1921, declaring peace.

If the demands of the Custodian, by reason of such defect in the Statute as has been pointed out under Point III, did not constitute a completed capture, the Court could not complete "capture" after the coming of peace. The Cus-

todian's power of seizure was purely a war power and totally ceased with the end of the war.

Stoehr vs. *Wallace,* 255 U. S. 239.

Even before the adoption of the Peace Resolution, if the demand was invalid when made, so that it did not constitute a constructive seizure or capture, the Court could not treat the illegal determination and demand as a substitute for facts showing probable cause to believe the property enemy property, but could only assist a discovery of the facts, and, upon their disclosure, determine whether or not *they* showed probable cause for seizure.

POINT VI.

The requirements of the IV. Amendment were not evaded by petitioning in equity.

The requirements of the IV Amendment may not be obviated by giving Equity Courts the power to issue warrants for seizure under another name. Constitutional prohibitions are not to be treated in this way. And the additional terms of the IV Amendment guaranteeing security from unreasonable seizures are much too far-reaching to be avoided in any such way.

The Act contains no provision that Courts of Equity, if applied to by the Custodian, shall drop all equitable principles in considering his application.

Nor is there any necessity of reading into it any such provision. The Custodian did not have to apply in equity. And when he did so, asking for an order to show cause, *if any there be,* why a *court of equity* should not order the property delivered to him, he invited consideration of every equity, and of every fact that the respondent might bring to the attention of the Court.

It is clear that there are at least some fundamental defenses that may be raised against proceedings even though purely possessory in character and that the question whether the proceeding is of that character must necessarily be open to adjudication.

B.

In the case at bar matters appeared on the face of the Custodian's petition and the proposed answer of Appellant Wesche (as well as by the amended answer of the Commercial Trust Company) constituting defenses to the claim for decree of transfer and delivery of property of Wesche.

POINT VII.

The Custodian failed to *allege* that he had made any requirement of delivery in accordance with the provisions of the statute.

In seeking a remedy of so harsh a character (especially if it be claimed that the Custodian is not required, under the IV Amendment, to show facts constituting probable cause), the Custodian is to be held, at least, to clear, strict and precise allegation of the facts which he claims would exempt him from any showing of facts constituting probable cause.

There are in every case two totally independent factors which the Custodian is called upon to investigate and determine before he may seize:

a) the ownership of the property sought;

b) the enemy character of the owner.

Both determinations must be shown.

In this case the Custodian sedulously alleged in the most direct manner that the former Custodian, Mr. Palmer, had, in June, 1918, after investigation, determined that Mrs. von Schierholz was then an enemy (p. 5).

But the Custodian was equally careful *not* to make any direct allegation in his petition that either he, or the former Custodian, had, "after investigation," determined that the property he sought belonged to Mrs. von Schierholz (p. 6).

Instead of making such an allegation, the petitioner alleged, in paragraph V, that the former Custodian, after determining that Mrs. von Schierholz was *an enemy,* "required" the Commercial Trust Company to transfer to him *all* the property which it had reported deposited with it in the joint names of Wesche and Mrs. von Schierholz. And the pleader adds that the demand was served on the Trust Company on or about July 8th, 1918, and annexes a copy of it to his petition and makes it a part of his petition.

(Petition, Paragraph V, pp. 5-6, 29-34.)

The annexed copy of the demand served on the Trust Company to be sure contains the statement (in somewhat mutilated form), that the Custodian after investigation, does determine that the property "is by you owing and belonging to and "held for, by, on account of, and on behalf of, "and for the benefit of Helene J. von Schierholz, "Address: Schloss Plaue, Thuringen #3 Plaue, "Thuringen, Germany, whom after investigation "I do determine to be an enemy" etc. (Record, pp. 31, 33-34).

Annexing a copy of a paper, which it is alleged was served over two years earlier, in which a former Custodian stated that he had determined the ownership of the property after investigation, is not an allegation that such former Custodian did investigate, or did determine after investigation.

Moyer v. *Peabody,* 212 U. S. 78, 84;
Bell v. *Bell,* 181 U. S. 175, 178;
Thompson v. *Whitman,* 18 Wall, 457, 458.

Where it is desired to substitute determination by the Custodian after investigation, for a showing of facts constituting probable cause, there should be no relaxation of the rule requiring definite allegation of the vital fact that such "determination after investigation" has been made of each of the two vital features.

The drawer of the petition seems to have been aware of this in a general way, for he was careful to allege directly the investigation and determination of the enemy character of Mrs. von Schierholz (Par. V, p. 5), although that was equally recited in the demand (Record, p. 34). But he was equally careful *not* to make this allegation concerning the ownership of the property.

When it came to the second requirement of delivery, alleged to have been served on or about April 17, 1919, the same method of allegation was adopted (Par. VI, pp. 6-7), except that in this instance there is no direct allegation that the Custodian even investigated or determined after investigation that Mrs. von Schierholz was an enemy.

Nor could the petition itself be considered such a determination for it does not purport to be either signed or verified by the Custodian, but only by the Managing Director of the Custodian's office (pp. 8-9). Nor does the petition contain any allegation that the Custodian has determined such ownership or even that the property in fact belonged to Mrs. von Schierholz. Judged as a "purely possessory" proceeding, based on substituting a determination made by the Custodian after investigation for a showing of facts constituting probable cause to believe the property

enemy property, the petition was thus fatally defective on its face.

POINT VIII.

The Custodian failed to *allege* probable cause to believe the property he sought to be enemy property.

The petition of the Custodian contains no allegation that the property in question belonged to Mrs. von Schierholz.

It contains no showing of any facts constituting probable cause to believe that it was her property. The only fact it shows is that the Commercial Trust Company reported to the Custodian that this property was held by it pursuant to an agreement reading as follows:

> "RECEIVED, Jersey City, January 30, 1913, for the account of Frederick Wesche of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed, and having a par value of five hundred and twenty four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said

interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2% of the amount so collected; this receipt is executed in triplicate.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. W. Hardenbergh, President.

Attest:
Wm. J. Field, Secretary
(Seal)

The deposit of the bonds with the Commercial Trust Company of New Jersey and the terms upon which said Trust Company is to hold and deliver over the said bonds and to collect and pay over the interest thereon as set forth in the above receipt is hereby ratified and confirmed.

Dated February , 1913.

Fr. Wesche,
Helene J. v. Schierholz."

(Record, pp. 17-18.)

Upon the face of this agreement it is indeterminate whether there is a joint ownership or not. At the most what could be assumed from the face of the instrument would be equality of interests. Properly, the instrument called for further investigation as to the interests represented.

Kaufman v. *Edwards*, 92 N. J. Eq. 554;
Kelly vs. *Beers*, 194 N. Y. 49, 55;
Matter of McKelway, 221 N. Y. 15, 19
Matter of Buchanan, 184 A. D. 237.

There were, however, the additional statements in that report of the Trust Company to the effect that Frederick Wesche was interested in the property under the (so-called) trust-agreement (page 17), and that "So far as Commercial Trust "Company knows Helene J. von Schierholz and "Frederick Wesche are sole beneficiaries under "said agreement" (page 19), and went on: "The "property held in trust for Helene J. von Schier- "holz and Frederick Wesche is set out in Sched- "ule E hereto annexed" (p. 19). The petition sought and the decree required delivery of *all* the property to the Custodian (pp. 7, 8 and 170-173), and not of Mrs. von Schierholz's property alone.

True, the contract left the matter open for extraneous proof of different interests.

Kaufman v. *Edwards,* 92 N. J. Eq. 554, 558, 559;
Matter of Buchanan, 184 A. D. 237.

But the Custodian made no inquiry and proffered on his part no further evidence in this direction and had obtained none (pp. 146-147). It is only the proposed answer of Wesche, and the amended answer of the Trust Company which showed anything on this subject, and they showed that Mrs. von Schierholz's interest was not a joint one but a several one and extended to something less than a third of the property. And the truth of these allegations was admitted by the Custodian (p. 148). Under the doctrines of the above four cases the making of the deposit in the joint names by Wesche conferred no title on Mrs. von Schierholz that she did not previously possess.

In other words the Custodian showed at most by his petition, probable cause to believe that Mrs. von Schierholz had an interest in the property he demanded, but failed to show any probable cause to believe her the owner of the entire property; and, as far as the report went Wesche appeared to have at least an equal interest.

The rule was settled a century ago in this Court, as well as by Justice Story at the Circuit, and by Lord Stowell in the High Court of Admiralty, that joint property was not subject in its entirety to capture, if but one of the joint owners were an enemy, but only to the extent of the enemy's share; and this even though that enemy had the right, normally, to demand delivery of it all from any one but the other joint owner.

The Francis (Graham's claim), 8 Cranch, 348;
The Ship Francis, John Graham's Claim, 1 Gall. 618;
The Franklin, 6 Chr. Rob. 127.

The Custodian, by his petition, thus wholly failed to allege facts constituting probable cause for seizing any part of the property except such as belonged to Mrs. von Schierholz. And showed only that a part of it was hers.

POINT IX.

The Custodian failed to *show* any probable cause to believe that Mrs. Von Schierholz was the owner of any greater or different interest than the definite part which the proposed answer of Wesche, and the amended answer of the Commercial Trust Company alike disclosed was hers, but admitted that such was the total extent of her ownership.

In the case of *Central Trust Co.* vs. *Garvan,* reported below *sub nomine Garvan* vs. *$20,000 Bonds,* in 265 Fed. Rep. 477, 479, the Circuit Court of Appeals for the Second Circuit held that "As all the facts were known and undis-"puted they amounted to an investigation by the "Alien Property Custodian."

Correspondingly, in *Ripper* vs. *United States,* the Circuit Court of Appeals in the Eighth Circuit said:

> "The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause, *or there should be a hearing by him with that purpose in view.*"
>
> *Ripper* vs. *United States,* 178 Fed. Rep. 24, 26.

We have seen under Points VII and VIII, that the petition contained no allegations of facts constituting a showing of probable cause, so we turn

to the results of the hearing. The proposed answer of Wesche, and the amended answer of the Commercial Trust Company were substantially identical.

By objecting to the intervention the Custodian *pro hac vice* admitted the truth of Wesche's proposed answer.

Johnston vs. *Donovan,* 106 N. Y. 269.

And this constructive admission was in this case fortified by the express admission by the Custodian of the truth of the same allegations, which were contained in the amended answer of the Commercial Trust Company (Record, p. 148).

The Custodian on his part offered no other proofs of ownership, or of investigation, or of determination of ownership (p. 146).

He thereupon admitted the truth of all the allegations of the Trust Company (p. 148), which were the same as Wesche's own allegations, and they became the facts from which the existence of probable cause for granting the order had to be determined.

Garvan vs. *$20,000. Bonds,* 265 Fed. 477, 479.

By the order to "show cause, if any there be," the Custodian, who had specifically prayed such order, and the Court, which issued it, had provided for the kind of hearing mentioned in *Ripper* vs. *United States* for the purpose of ascertaining whether there was probable cause to believe all this property enemy property. On that hearing the following situation thus appeared:

The property in question was owned in part by Mrs. von Schierholz, in part by Wesche, in

part by Ahrenfeldt and in part by Mrs. von Uxküll-Gyllenband (p. 56).

The property of each of the four was separate, distinct and identified (pp. 56-70).

The two ladies were both born citizens of the United States, who had lost their citizenship many years before the war by marrying Germans (pp. 50-51, 55). Their properties had been derived from the estates of their father and mother, American citizens, and had been held without any change of ownership since April, 1914 (p. 56). As they had both been born in Paris, France, while their American parents were temporarily residing there, they did not (according to the Custodian), come within the provisions of the Amendment constituting Subdivision (b) 3, of Sec. 9 of the Trading with the Enemy Act, as orinigally enacted June 5, 1920, but they unquestionably came within the provisions of that subdivision as amended by the Act of February 27th, 1921.

As we have seen Mrs. von Schierholz, as to all the property, except what was her own, had acquired no title by the deposit agreement, and was merely an alternate agent, authorized to act in case of Wesche's death or disability (*Supra,* pp 7, 55, 56).

The Custodian had never demanded that any of the property in question be delivered to him as the property of Wesche, of Ahrenfeldt, or of Mrs. von Uxküll-Gyllenband, but adhered steadily and absolutely to his proposition that, no matter what the interests were, there could be no separation of the property, but it must *all* be delivered to him as the property of Mrs. von Schierholz; and such was the decree.

The facts adduced on the hearing consisted of the admission of the facts stated in the amended answer of the Commercial Trust Company, which were the same facts as were stated in Wesche's proposed answer (p. 148). They did not constitute probable cause to believe that all the property belonged to Mrs. von Schierholz, but, being admitted, as they were, showed conclusively that only a segregable and minor part of the property was hers. These undisputed facts did not justify decree for delivery of any part of the separate property of Wesche or Ahrenfeldt, or even of that of Mrs. Uxküll-Gyllenband as that of Mrs. von Schierholz, even if delivery of *her* property could be decreed in face of the act of February 27th, 1921.

POINT X.

The proposed answer of Wesche (as well as the amended answer of The Commercial Trust Company, the truth of which was admitted) set up numerous lawful defenses to the petition, even assuming that the proceeding was purely possessory in its nature.

(a) *The answers each showed that the Custodian had made no such investigation of the ownership of the property as the law required.*

Investigation and determination that Mrs. von Schierholz was an enemy, would not justify seizure of any property unless it was determined "after investigation" that the property was hers.

The Custodian received the report of the Commercial Trust Company on December 19th, 1917 (Record, p. 4). His first demand was dated June 19th, 1918, and served July 8th, 1918. (Rec-

ord, pp. 5-6). Six months intervened between his receipt of the report and the signature of the first demand, followed nearly three weeks later by its service. During all that time the Custodian had not only notice of Wesche's interest from the fact that the deposit was in the joint names and from the direct statement of the Trust Company, but he also had Wesche's Paris address, and he admitted (both constructively and expressly), that a mere letter sent to Wesche at that address by mail, would have promptly brought him full, reliable and accurate information as to the interests of all parties in this property. He sent no such letter, and he admits that he made no inquiry or investigation into the ownership of the property, beyond receiving the report of the Trust Company, which, on its face, showed that Mrs. von Schierholz had but a half interest in the property, and was *not* the owner of it all (p. 146).

(b) *The provision for determination "after investigation" requires a determination predicated on facts shown by the investigation. The pretended determination that Mrs. von Schierholz was the sole owner was not so predicated but was in flat contradiction, not only of the actual facts, but also of the only information obtained by the Custodian.*

That "determination after investigation" requires a determination supported by the facts developed by investigation, and not in conflict with all facts ascertained, goes without saying. Somewhere along the line there have to appear the facts constituting "probable cause." The only fact bearing on the ownership of the prop-

erty known to the Custodian, or which he took the trouble to ascertain, was that the property was deposited in the joint names of Wesche and Mrs. von Schierholz. Wesche, he admitted, was not an enemy, and the Custodian had never claimed otherwise (Record, p. 146).

On those facts alone, no conclusion could lawfully be drawn beyond that Mrs. von Schierholz was an equal joint owner, and that nothing beyond her interest was subject to seizure (*supra*, Point VIII).

The pretended determination that she was sole owner of the entire property was in flat conflict with all the facts disclosed to the Custodian, and consequently was not in any true sense a determination "after investigation."

(c) *The pretended determination was not made by the Custodian himself upon consideration of the results of the investigation made in his behalf. The law required his personal determination.*

The statute calls for determination by the President, but provided, Section 5 (a): "The Presi-"dent may exercise any power or authority con-"ferred by this Act through such officer or of-"ficers as he shall direct."

That the President made a personal determination is not pretended.

The President authorized the Custodian to make these determinations. He did not give such authority to any one else.

If the determination is to take the place of the showing of "probable cause supported by oath or affirmation," as the basis for a warrant of seizure, it is certainly at least semi-judicial, and not merely ministerial in character, and as such

called for the personal determination of the Custodian, a conclusion otherwise supported by the nature of the determination.

Runkle vs. *United States,* 122 U. S. 543.

But, the Custodian urges, with the multiplicity of cases presented, it was impossible for any one man to do this. Consequently, he suggests, the Custodian must have had power to delegate this duty.

This is a clear *non-sequitur.* If the Custodian found that he alone could not attend to this work affording the protection to citizens and neutrals that the law required, then the Custodian should have asked the President to direct that such powers might be exercised by additional persons. It did not lie with the Custodian to delegate to others those high powers of determination which were granted to him for his personal exercise. *Delegatus non potest delegari.* Congress conferred that power on appointees of the President, not on clerks of such appointees.

The proposed answer of Wesche, as well as the Amended Answer of the Trust Company each raised this additional objection to the conclusiveness of the pretended determinations after investigation (pp. 47 and 104).

(d) *Under the provisions of the IV and V Amendments to the Constitution, neither the demand of July, 1918, nor that of April, 1919, could constitutionally, when not acceded to, constitute a completed capture of the property of either Wesche or Ahrenfeldt, neither of whom*

was an enemy or ally of enemy, and to each of whom, at the time of each of those demands, all judicial review of any such seizure was denied. Nor was "capture" subsequently completed by the Custodian or by the Court.

Entirely independent of all other questions of sufficiency of the investigations or determinations by the Custodian recited in the demands served on the Commercial Trust Company, is the point that, in view of the prohibition of all judicial review of the attempted seizure of the property of either Wesche or Ahrenfeldt at the suit of either of them, the mere demands, neither of them, constituted a constructive completed "capture" of their property. (Reference is here made to Mr. Ahrenfeldt's separate property also, because Wesche had a special property therein as Ahrenfeldt's bailee.)

That there was *no actual physical seizure* is plain. The Commercial Trust Company still holds the securities and the money.

The Trading with the Enemy Act, until July 11th, 1919, in terms forbade any judicial review of the seizure by any Court at the suit of the owner, save by the District Court of the United States for the Judicial District in which the claimant resided (Section 9).

Wesche was admittedly neither an enemy nor an ally of enemy and resided in Switzerland. The Custodian had been given his earlier Paris address. But neither place was within a judicial district of the United States.

Ahrenfeldt, as appeared by the proposed answers of Wesche and of Ahrenfeldt, (as well as by

the admitted allegations of the amended Answer of the Commercial Trust Company) was neither an enemy nor an ally of enemy, but an American citizen, resident part of the time in England, and part of the time in France or Switzerland, but not at any time during the war in any judicial district of the United States.

Each was thus forbidden *any* judicial review of any seizure of his property by the Custodian.

Under the doctrine of *Garvan* vs *$20,000 Bonds*, 265 Fed. Rep. 477, 479, not only seizure of the property of Wesche, but the statute authorizing it, was unconstitutional and void, as to Wesche and his property, at the time these demands were served, as in conflict with the V Amendment, and also, we may add, with the IV Amendment.

Vide Point III *supra.*

And the same was true of Ahrenfeldt and his property.

In view of such unconstitutionality the demands so made of the property of these non-residents, prior to the amendment of July, 1919, could not constitutionally operate as constructive capture.

Not only were the demands void, but, the statute itself being unconstitutional as to these non-residents, all the steps taken by the Custodian in the way of determination of the ownership of the property of these non-residents were likewise void, when made.

No attempt to make a subsequent determination or to serve a subsequent demand for delivery of the property was ever made by the Custodian. Were these earlier proceedings of his made valid or their effect extended by anything occurring subsequently?

We call attention to the sequence of events:

October 6th, 1917—Trading with the Enemy Act passed in its original form.

December 18th, 1917—Report by the Commercial Trust Company indicating that Wesche was at least part owner.

July 8th, 1918—First Custodian's demand served (Palmer).

November 11th, 1918—Armistice by the terms of which the United States undertook to suspend all hostilities.

March 28th, 1919—Supplemental report of additional income by the Commercial Trust Company.

April 17th, 1919—Second Custodian's demand served (Garvan).

July 11th, 1919—Amendment adopted allowing non-residents to sue in the Supreme Court of the District of Columbia.

June 5th, 1920—Amendment of Section 9, Subdivision b)3, adopted, providing for return of property of American women, born within the United States, who had married Germans, "without application therefor".

July, 1920—Demand of the property by Wesche.

September 11th, 1920—Present petition in equity filed by the Custodian and order to show cause issued.

February 21st, 1921—Amended answer of the Commercial Trust Company filed, and its allegations admitted (p. 148). Petitions for leave to intervene with proposed answers of Wesche and Ahrenfeldt presented. Matters orally argued and leave given to file briefs on March 15th, 1921.

February 27th, 1921—Subdivision (b), 3 of Section 9 amended to cover American women born abroad.

July 2nd, 1921—Adoption of Peace Resolution by Congress and signature by the President.

October 18th, 1921—New German Treaty of August 25th, 1921, Ratified by the Senate.

October 22nd, 1921—Opinions filed by the District Judge denying applications of Wesche and Ahrenfeldt to intervene, and directing final decree for conveyance and delivery of all the property (including that of both Wesche and Ahrenfeldt) to the Custodian.

November 11th, 1921—Ratifications of Treaty with Germany exchanged.

January 16th, 1922—Order denying applications to intervene entered.

January 19th, 1922—Final decree entered, awarding transfer of this appellant's testator's property to the Custodian.

At what stage, if any, were the prior demands validated and turned into completed constructive captures. There has been no *actual* capture, for the Commercial Trust Company still holds the property.

The amending act of July 11th, 1919, contained no provision stating that earlier illegal demands were ratified, or made into constructive captures. Nor was such the natural construction of such amendment. *A fortiori* such construction is not justifiable in the face of the express provision of the Armistice entered upon seven months earlier, putting an end to all "hostilities on land or in the air". Capture of private property of enemies even, under the Trading with the Enemy Act is justifiable only as an act of war, under the war powers.

Stoehr vs. *Wallace,* 255 U. S. 239.

It is an act in the nature of hostilities. And such a construction as making capture out of what was not previously a capture, canot be forced onto this amendment in violation of the pledged faith of the Government.

The like doctrine would seem also applicable to the Custodian's demand of April, 1919. While the war was not terminated by the armistice, the right of new capture of private property of individual enemies was terminated thereby.

The filing of the present petition in equity on behalf of the Custodian was not a new determination or requirement of delivery, for that document carefully abstains from alleging anything more, as to either the ownership of the property or any determination thereof, than that the former demands had been served at the times mentioned; and prays "in the alternative" that the Commer-

cial Trust Company be required to show cause, if any there be, why all the property should not be turned over to the Custodian. Moreover, it could not be a determination *by the Custodian,* or a confirmation of a determination by him, because it does not purport to be either signed or verified by the Custodian himself, but only by the "Managing Director" of his office. (Record, pp. 8-9).

And, further, by that time Mrs. von Schierholz had no right to delivery of the property for it had already been demanded by Wesche (p. 74).

On February 21st, 1921, the Custodian admitted that all the allegations of the Commercial Trust Company as to the ownership of the property and the status of Mrs. von Schierholz and Mrs. von Uxküll-Gyllenband were true, and on February 27th, 1921, the Act was signed providing for the return of property seized by the Custodian belonging to women holding their status.

On July 2nd, 1921, the Peace Resolution was adopted by Congress and signed by the President and the war was at an end.

Clearly no step taken up to that time constituted a completion of an incomplete capture of the property of either Wesche or Ahrenfeldt.

As to the property of Ahrenfeldt, clearly, no capture could be made after peace had been declared.

Stoehr vs. *Wallace,* 255 U. S. 239.

Did either the Joint Resolution of July 2nd, 1921, or the subsequent treaty with Germany authorize subsequent completion of capture of the property of either Wesche or Mrs. von Schierholz or Mrs. von Uxküll-Gyllenband.

The Custodian relies on the following language of the Peace Resolution:

"All property of the Imperial German Government, or its successor or successors, and *of all German nationals,* which was on April 6th, 1917, in, or has since that date come into the possession or under control of, *or has been the subject of a demand* by the United States of America, or of any of its officers, agents, or employees from any source or by any agency whatsoever * * * shall be retained by the United States of America and no disposition thereof made, *except as shall have been heretofore, or specifically hereafter shall be provided by law, until such time as*" etc., etc.

No private property could be retained under this clause save that of persons coming within the description of "German nationals", which had been demanded as such. And property the disposition of which had been specifically provided for by law was likewise by its terms excepted from the operation of this provision. The return of Mrs. von Schierholz's property and that of Mrs. von Uxküll-Gyllenband had been specifically provided by law. The Custodian had never made demand of any of the property save as property of Mrs. von Schierholz. Could he in the face of that fact claim to complete a capture of the admitted separate property of this neutral, which he had demanded only as property of Mrs. von Schierholz, when he did not claim and never had claimed that Wesche was an enemy (p. 146).

The United States government might not, in the face of the IV and V Amendments capture the property of a neutral by its very declaration of peace.

Nor, months after peace had been declared, could it, by treaty, acquire from the German Gov-

ernment the right to "capture" private property of a neutral, contrary to the IV and V Amendments. The German Government could confer no such power. It could only bar itself.

The admitted fact of Wesche's neutrality, and that the Custodian had never claimed that he was an enemy (p. 146), especially when coupled with the fact that no demand of any property, *as his,* had ever been made by the Custodian, barred any claim of right to capture or retain the property *as his,* by virtue of the terms of the Joint Resolution. And the terms of that Resolution coupled with the act of February 27th, 1921, and the admitted facts as to her status prevented any showing of probable cause to take or retain property of Mrs. von Schierholz. Seizure of Wesche's property was doubly unwarranted.

If there was ever completed capture of Wesche's property we must then find it in the decision or decree of the Court. But if it is sought there, two insuperable objections interpose themselves:

a). The proceeding is not then a purely possessory one to enforce a capture previously made, but a proceeding to make a capture, thus entitling the owner to be heard.

b). The right of capture came to an end with the war, months before the Court handed down its opinion.

Stoehr vs. *Wallace,* 255 U. S. 239.

There has been then no lawful completed capture of Wesche's property under these demands.

POINT XI.

The present proceeding was not a purely possessory one, such as this Court described in *Central Trust Co.* vs. *Garvan*, 254 U. S. 554, but was petitory in character.

Over and over again the proceeding was marked as not purely possessory, but petitory in character.

1. *Such a purely possessory proceeding can not be maintained in equity. The nature of the jurisdiction in equity requires some consideration of the rights of the parties.*

The original petition herein was specifically entitled "In Equity" (p. 3). It was expressly labeled a petition in Equity (p. 3) and was drawn in the form of a petition in equity, and not of a declaration at law (pp. 3-8). It was addressed like a bill in equity, to the Honorable Judges of the District Court (p. 3).

The petition was specifically a petition for relief (p. 3), and it concluded with a prayer that the court issue a rule directed to the appellant

> "Commanding it, *in the alternative,* to con-
> "vey, transfer, assign, deliver and/or pay to
> "your petitioner, Alien Property Custodian,
> "the said money and other property herein-
> "before described, with interest thereon ac-
> "crued, or *else* upon a day and at a place to
> "be named in said writ to *show cause if any*
> "*there be,* why the relief herein prayed should

"not be granted, and for such other and fur-
"ther relief as in the premises may seem
"meet and just" (p. 8).

We were informed by the Assistant District Attorney for the District of New Jersey, who originally had the matter in charge, that this proceeding was intentionally brought in equity to test out the results of petitioning in equity instead of proceeding at law.

The Custodian, by petitioning in equity for a decree, cannot avoid the requirements which the IV Amendment to the Constitution specifically imposes on an issue of a warrant. By applying in equity he invited hearing of all equitable considerations affecting his demand, and made this emphatic by asking that the Trust Company show cause, "if any there be."

2. *The proceedings were expressly and in terms instituted under Section 24 of the Judicial Code and not as a* PURELY *possessory proceeding under Section 17 of the Trading With the Enemy Act.*

We call attention to the allegations at page 8 of the original petition. It is alleged that the proceeding was brought by the petitioner pursuant to the provisions of Section 24 of the Judicial Code and Section 17 of the Trading With the Enemy Act.

3. *The petition expressly prays for the exercise of equity powers and for equitable relief* (p. 8).

The Custodian expressly prayed for such other and further relief as may seem meet and just

(p. 8). He thus invoked the Court's consideration of how far the property ought *justly* to be turned over to him. There is nothing in Section 17 of the Trading With the Enemy Act, that says a purely possessory proceeding may be brought in equity. All it says is that "the District Courts" are given jurisdiction to make and enter all such rules as to notice and otherwise and all such orders and decrees, and to issue such process as may be *necessary and proper* in the premises to enforce the provisions of the act. There is nothing that says that equitable relief is to be given otherwise than upon equitable conditions. Nothing that limits the Courts to purely possessory proceedings. The Custodian may pray assistance in the investigation and determination.

It seems, too, that any contention that a court of equity shall act otherwise than upon equitable considerations is in conflict with the provisions of Clause 1 of Section 2 of Article IV of the Constitution, providing that the judicial power shall extend to all cases at law and in equity. The two jurisdictions may not be confounded.

Scott v. *Neely*, 140 U. S. 106;
Cates v. *Allen*, 149 U. S. 451.

At law one may assert legal rights to possession irrespective of equities, but in equity a petitioner is required to do equity and show equities.

4. *The allegations of the petition are not sufficient as a basis for a purely possessory proceeding under this statute on any theory; not even on the theory of the Custodian that it is not necessary to show to the Court facts constituting probable cause, but that his own determination, made under the Act, is conclusive on the court, and requires it to issue a warrant without other showing of probable cause.*

Even on his own theory the Custodian must needs allege in positive and unquestionable terms that he made such determination "after investigation." Congress deliberately put that limitation on his powers as a "condition of their exercise."

> *Central Trust Co.* v. *Garvan,* 254 U. S. 554.

His only allegation is that he and his predecessor served demands containing statements that they had respectively so determined (pp. 5-7), which is not such an allegation.

> *Moyer* v. *Peabody,* 212 U. S. 78, 84;
> *Bell* vs. *Bell,* 181 U. S. 175, 178;
> *Thompson* v. *Whitman,* 18 Wall. 457, 458.

In the absence alike of any *direct allegation* of his having made a determination of the ownership "after investigation," and of any direct allegation that the property was enemy owned, the proceeding is one to secure information and lead to a determination whether it was enemy property or not. *That is a petitory proceeding,* and not a "purely possessory" one, and would re-

quire determination by the Court, on evidence presented to it by either party, not merely of the probable cause, which is required in the "purely possessory" proceeding, but also of the fact itself of ownership.

5. *Under the provisions of the IV Amendment forbidding issue of warrants "but upon probable "cause supported by oath or affirmation," the petition was insufficient as an application in a "purely possessory" proceeding, for failure to show facts constituting probable cause for seizure.*

It contained no showing of any facts, showing probable cause to believe that all this property belonged to Mrs. von Schierholz, or was enemy property.

A purely possessory proceeding, as this court pointed out in *Central Trust Co.* vs. *Garvan* is in substance merely an application for a warrant.

Any application then in a purely possessory proceeding had to contain a showing of facts supported by oath or affirmation, for the determination of the court, whose warrant was sought, whether or not they constituted probable cause.

Ripper vs. *United States,* 178 Fed. Rep. 24, 26;

Veeder vs. *United States,* 252 Fed. Rep. 414, 420;

United States vs. *Pitotto,* 267 Fed. Rep. 603;

United States vs. *Rykowski,* 267 Fed. Rep. 866;

24 Opinions Atty. Gen., 685, 688.

Lacking as it did any such allegations, the petition necessarily could not be construed as one in a purely possessory proceeding, when it was sufficient as an application for aid in investigation and determination.

6. *The form of the prayer for relief asking that the court require conveyance, etc. of the property "or in the alternative" require the Trust Company to "show cause if* ANY *there be" why the property should not be conveyed, etc.* (p. 8), *was an express invitation to the holder to show that the property, if such were the case, was not enemy property, and to the Court to compel disclosure and decide whether the property should be delivered, and transferred.*

Not only the petition but also the rule to show cause based upon it, expressly invited the appellant to show "any" cause why the property should not be conveyed to the Custodian (pp. 2, 8). The petition sought additional disclosure as a basis for determination.

The Custodian by thus applying to a court of equity in this form, waived his right, if any, to have possessory relief, upon determination by the court of probable cause, or otherwise than upon equitable considerations, especially when he expressly brought his petition under the provisions of Section 24 of the Judicial Code, as well as under the provisions of Section 17 of the Trading With the Enemy Act.

In equity, such an opportunity, offered by the Custodian and Court alike, necessarily included the opportunity to show that the property was not in fact enemy property or property the Cus-

todian was entitled to seize, as well as that he had never made the preliminary investigation required, or a determination based thereon, or a valid and lawful demand.

And this was emphasized in the case at bar by the showing, in the Custodian's petition, that the information he had received did not justify a conclusion that Mrs. von Schierholz was the owner.

7. *No purely possessory proceeding could be maintained resting simply on the basis of the Custodian's determination of the ownership of property which actually belonged to persons not enemies or allies of enemies to whom no judicial review of the seizure was permitted at the time the demands were made.*

In the absence of any allegation of a determination of the ownership by the Custodian after the amendment of the act in July, 1919, no purely possessory proceeding could be maintained on the strength of earlier "determination", unconstitutional when made as to the property of Mr. Wesche. As to his property there must needs be a new determination, or the proceeding had to be petitory.

8. *The petition at bar varied radically from those considered in Central Trust Co.* vs. *Garvan, in the very particulars which there led this court to say that it was obvious from the statement of the pleadings in those cases that the libels there were brought upon the theory that they were purely possessory actions.*

We may briefly compare the two forms of proceeding.

Proceedings in Central Trust Co. vs. Garvan, etc.	*Proceedings at Bar.*
(a) The proceeding was at law "in the na- "ture of a libel of in- "formation" by the Custodian "as Libellant."	(a) The proceeding was statedly in equity, by petition by the Custodian as petitioner in equity.
(b) The libellant alleged directly and in positive terms that he had, after investigation, determined that the property, possession of which he sought, belonged to the person, whom he had determined to be an enemy.	(b) The petitioner sedulously avoided alleging that he or his predecessor had made a determination of the ownership of the property after investigation.
(c) The libellant alleged that his proceeding was "in the nature "of a libel of informa- "tion," arising under Section 17 of the Trading With the Enemy Act.	(c) The petitioner alleged that this was a proceeding brought "pursuant to the provi- "sions of Section 24 of "the Judicial Code by "which the district "courts of the United "States have original "jurisdiction over all "suits of a civil nature "at common law or at "equity brought by the "United States or any "officer thereof and un- "der Section 17 of the "'Trading with the "Enemy Act'" (Record, pp. 7-8).

(d) The libellant alleged: That the "provi-"sion of the Trading "With the Enemy Act "which this Court is "asking (asked) to en-"force is Section 7 (c) "of the Trading With "the Enemy Act, as "amended November 4, "1918."

(d) The petition contained no such allegation.

(e) The prayer was that the Court direct the Marshal to take possession of the property and hold it until further order; and that the court order all persons making claims to the possession of the securities to appear and show cause why *possession* of the securities should not be delivered to the Custodian to be held, administered and accounted for according to the law, and for such other order or relief in the premises as to the Court shall seem just.

(e) The prayer was that the Court issue a rule requiring the Commercial Trust Company "*in the alternative* to "convey, transfer, as-"sign, deliver and/or "pay over to 'the Cus-" 'todian the money and " 'other property de-" 'scribed, or else' to "show cause, if any "there be, why the re-"lief herein prayed "should not be granted," and "for such other "and further relief as "in the premises may "seem meet and just."

(f) The process consisted in an order that the Marshal seize as so prayed, and that claimants show cause why the *possession* of the se-

(f) The sole process was the order to "forthwith convey, transfer, assign, deliver, and/or pay to" the Custodian,

curities should not be delivered to the Custodian to be held, administered and accounted for according to law.

the property described or "by answer duly verified to show cause if any there be why it should not be required by order of this Court so to do, and why the petitioner should not have such other and further relief as in the premises he may be justly entitled to."

It was six months after the Central Trust Co. case had been decided by the Circuit Court of Appeals, that the Custodian started the present totally distinct form of proceeding, in which he prayed not mere delivery of possession, but transfer, assignment and conveyance as well; and expressly gave opportunity for disclosure of the facts under oath, and determination of the extent of enemy ownership.

The Federal Courts under the provisions of Section 17 were as available for purposes of investigation under the act, as for mere purposes of securing mere possession. And the Custodian prayed that the defendant show cause if any there be, alleging in terms that the enemy status of Mrs. von Schierholz had been determined after investigation, but sedulously omitting any positive allegation that the ownership of the property had been so determined, and addressed his petition to the equity side of the Court. It was a petition that a showing be required by the Court of the facts on which a determination would be made whether the property was enemy property or not,

as well as a prayer for conveyance of whatever the Custodian might be entitled to have transferred to him. It was not a purely possessory proceeding.

POINT XII.

The proceeding being not purely possessory, but petitory in character, and instituted in a court of equity, the status of Mrs. von Schierholz as an American woman by birth, who had lost her citizenship only by marriage to a German, and her consequent right to a return of her property under the provisions of Subdivision b) 3 of Section 9 of the Trading With the Enemy Act, as amended by the Act of February 27th, 1921, were to be considered; and, the facts entitling her, under that statute, to immediate return of her property, even "without application therefor" being admitted, constituted ample cause shown for not delivering any of the property to the Custodian.

By the act of June 5, 1920, provision was made that the president, upon ascertaining the facts in various cases *"may, without any application being made therefor"* return seized property belonging to enemies of certain classes.

By this act of February 27, 1921, the clause of the act of June 5, 1920, was specifically amended so as to cover the case of "a woman who at the "time of her marriage was a citizen of the United "States and who prior to April 6, 1917, inter-

"married with a subject or citizen of Germany "or Austria-Hungary, and that the money or other "property concerned was not acquired by such "woman either directly or indirectly from any "subject or citizen of Germany or Austria-Hun-"gary subsequent to January 1, 1917."

Admittedly both Mrs. von Schierholz and Mrs. von Uuküll-Gyllenband came directly within this amended provision, whatever may have been the case under the act of June 5, 1920, before the amendment of February 27, 1921.

Turning to the provision of the act for return in the cases covered by it, the material language of the act—Section 9 of this same Trading with the Enemy Act, as amended, under which the Custodian asserts the Court is bound to deliver this property to him irrespective of the facts—is as follows:

> "If the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, was * * *
>
> (3) A woman who, at the time of her marriage, was a citizen of the United States and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary, and that the money or other property concerned was not acquired by such woman, either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917; * * * then the President, *without any application being made therefor, may* order assignment or delivery of such money or other property held by the Custodian * * * either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

The facts showing that Mrs. von Schierholz and her property came directly within these provisions of Subdivision 3, were alleged both by Wesche and by the Commercial Trust Company and admitted by the Custodian. (Record, p. 148).

It is almost horn-book law that the word "may" in such a context is mandatory in meaning and tantamount to the word "shall".

> *Mason* v. *Fearson,* 9 How. 248, 259-260;
> *Washington* v. *Pratt,* 8 Wheat. 681.

The question when the word "may" is mandatory and when permissive, is very fully discussed from all angles in the case of *People ex rel Comstock* v. *Syracuse,* 59 Hun. 258. The rule is that where the provision is for the sake of justice, or where public interest or private right requires that it be done, the word "may" means the same as "shall" and is mandatory.

In this case, when the fact was shown that Mrs. von Schierholz and her property came directly within the purview of this provision of the Acts of February 27, 1921, and June 5, 1920, she was entitled as a matter of right to its benefits and to such return of her property.

Under such circumstances we are unable to see how any probable cause for the delivery of *her* property to the Custodian can be thought to exist. He has never made any claim here for any property except as property of hers, and she is entitled to have her property returned to the Trust Company.

Mrs. von Uxküll-Gyllenband was in like position and there was no basis for any seizure of property of either Wesche or Ahrenfeldt.

Seizure under such circumstances is "unreasonable seizure" and prohibited.

A Court of Equity acts upon the statute in force at the time it makes its decree, and not upon the statute in force at the time of commencement of the proceeding.

Denver v. *Mercantile Trust Co.*, 201 Fed. 790, 810;
Richardson v. *Green*, 61 Fed. 423, 431;
Pond v. *Harwood*, 139 N. Y. 111, 120;
Dietrich v. *Fargo*, 194 N. Y. 359, 363.

Moreover, a court of equity will make a complete decree covering the whole situation so as to prevent litigation by taking away the necessity of a multiplicity of suits.

Camp v. *Boyd*, 229 U. S. 530, 551-552;
Decker v. *Caskey*, 1 N. J. Eq. 427;
Williams v. *Winans*, 22 N. J. Eq. 573, 577;
Curtin v. *Krohn*, 4 Cal. App. 131, 135;
Jelly v. *Lamar*, 242 Mo. 44;
Story Equity Pleadings, Sec. 72.

And this regulation of equity procedure was acceded to by the Custodian when he specifically addressed this petition to the equity side of the Court, and invited its aid as a Court of Equity.

No Court of Equity should decree transfer to the Custodian of property which he admitted he would be under instant obligation to return, unless it were required by law to disregard all considerations of equity or justice, and the provisions of the IV and V Amendments. And the constitutionality of any such possible law we deny.

POINT XIII.

Neither the provisions of the Joint Resolution of July 2nd, 1921, nor those of the Treaty with Germany, ratified and promulgated in November, 1921, gave authority for the capture of the property of Wesche, a neutral, though by nationality a German; and seizure of his property could not be made after July 2nd, 1921, under the provisions of either the Joint Resolution or the Treaty, contrary to the IV. and V. amendments.

The order or decree refusing leave to intervene was entered only on January 16th, 1922, six months after the joint resolution of July 2nd, 1921, and two months after the promulgation of the treaty with Germany (p. 221).

No treaty with Germany could empower the United States Government to capture private property of a neutral in peace-time, in disregard of the limitations of the Constitution.

The moment peace was declared on July 2nd, 1921, the power of the Custodian to "capture" private property, not already captured, was at an end.

Stoehr vs. *Wallace,* 255 U. S. 239.

If, as we have argued above, (Point X,d,) the capture of Wesche's property was not complete on July 2nd, 1921, neither Resolution nor Treaty could authorize its "capture" in time of peace in the face of the IV and V Amendments.

C.

Wesche was entitled to intervene to present these various defenses.

POINT XIV.

Wesche was entitled to be heard, as of right, even though the proceeding were purely possessory in character, as to the sufficiency of the showing by the Custodian to entitle him to a warrant for mere possession.

The owner of property is certainly entitled, when a Court is called upon to consider the matter of issuing a warrant for the seizure of his property to insist that it require a showing of the probable cause called for by the IV Amendment. If it were done *ex parte* without such showing he could have it vacated for that reason.

Veeder vs. *United States,* 252 Fed. Rep. 414, 418.

Petition for Certiorari denied, 246 U. S. 675.

In re Tri-State Coal Co., 253 Fed. Rep. 605.

A fortiori he may object to its issue beforehand, and any Court, and especially a Court of Equity, should be ready to entertain so fundamental an objection.

Also he was entitled to raise the constitutional objection (argued under Points II and X,d *supra*) that as to his separate property (and that

of Ahrenfeldt in his custody), the Act authorizing the requirement of delivery under which the Custodian claimed to have made his demand and recited determination, was unconstitutional, forbidding as it did at that time any court review of such a demand or constructive seizure at the suit of either of such non-residents.

He was also entitled to be heard to object, even though the proceeding were a purely possessory one, that the Custodian had not made or even alleged that he had made the prior "investigation" which the law required of him, or any determination predicated thereon; both jurisdictional preliminaries to any seizure by the Custodian.

He was entitled to be heard on the question whether this were on its face a purely possessory proceeding by the Custodian.

The right to insist that possession of his property should not be taken, even temporarily, otherwise than in accordance with law, is a valuable right, especially so when as here the statute provides no compensation for the detention, however illegal or prolonged, but only for return of the property held. The very existence of the old action of *detinue* in the *detinuit*, established that detention without compensation imposes loss. And, detention, under such seizures, has and may run for many months.

POINT XV.

If the proceeding were no purely possessory the right to intervene and protect his possession of his property exists *a fortiori*.

All the grounds for permitting intervention had the proceeding been a purely possessoy one are equally available if the proceeding be of a petitory character.

Judge Rellstab, on the petition for lave to intervene, bases his refusal of leave on the proposition that the proceeding is purely posessory in character, and that he has no power to consider *any* rights of the owner, (Record p. 53). Had he been of a different opinion on this point and thought that he had discretionary power to permit intervention, *non constat* but he would have exercised this power in favor of the appellant.

D.

The appellant was entitled to appeal direct to this Court from the decree of the District Court denying him leave to intervene.

POINT XVI.

The appellant had a general right to appeal from the decree denying him leave to intervene.

As we have seen (Point XV *supra*) the refusal of leave to intervene was predicated on lack of power to consider any rights of the owner, and leave was not refused as an exercise of judicial discretion.

In such cases the right to appeal exists. If any right of the petitioner for leave to intervene is denied or adjudged against him, his right of intervention is absolute and will be enforced by the Appellate Court.

> *Credits Conservation Co.* vs. *United States,* 177 U. S. 311;
> *Central Trust Co.* vs. *Chicago, R. I. & P. R. Co.,* 218 Fed. Rep. 336, 339.

Seizure of his property and its detention till he can establish affirmatively his right thereto, is an adjudication of the right of possession during that period. Such detention, with no provision for interest or damages pending detention, is a matter of serious moment. Depriving one by judicial decree at once of the possession of his property and of all right to compensation during such period of detention, is an adjudication against him of a valuable right.

The right to review the refusal of leave to intervene, even if it were only to insist that some probable cause to believe his property enemy property must be shown, before the Court could

issue a warrant for its seizure, is therefore absolute. And the District Judge was right in allowing appeal.

POINT XVII.

The denial of the right to intervene involved decision of questions of such character as to give the right to appeal direct to this Court from the decree of the District Court.

Section 17 of the Trading with the Enemy Act in terms gave the rights of appeal in such proceedings conferred by Section 238 of the Judicial Code.

That section provides for the taking of appeals direct to this Court

> "(3) in any case that involves the construction or application of the Constitution of the United States;
>
> (4) in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority its authority is drawn in question."

The presentation of the following questions clearly brings the present appeal under those provisions:

1). The question of the constitutionality of the Trading with the Enemy Act so far as it authorized seizure of property belonging to persons not enemies or allies of enemies, to whom it forbade all judicial review of such seizure.

2). The question whether Section 17 of the Trading with the Enemy Act is constitutional, when construed to require Federal Courts to issue warrants for seizure of property without showing of facts constituting probable cause.

3). The question whether the provisions of the treaty with Germany authorized capture of property of neutrals, who happened to be German Nationals, after the declaration of peace; and if so, whether they were constitutional.

4). The question whether under the IV and V Amendments an incomplete capture could be completed after conclusion of peace.

In view of the preceding argument further discussion of these points is here unnecessary.

E.

The doctrines asserted by the Custodian have not yet been established by this Court and should not be.

POINT XVIII.

The decisions of this Court in *Central Trust Co.* vs. *Garvan*, 254 U. S. 554 and in *Stoehr* vs. *Wallace*, 255 U. S. 239, are broadly distinguishable from the case at bar.

The Custodian maintains that the decisions mentioned have foreclosed all the contentions we urge. The District Court and the Circuit Court

of Appeals have apparently given their support to this view.

It seems to us erroneous. The question of the effect of a demand made by the Custodian of property belonging to one neither enemy or ally of enemy, but forbidden any judicial review of the seizure, or means of regaining his property, was not before this Court, or considered by it, in either of those cases.

The necessity of a showing of facts constituting probable cause in the judgment of the court, before it may issue a warrant, was not before the Court in those cases. In each instance, the existence of facts, constituting probable cause in the opinion of the courts below, was shown. Moreover, such point was not argued or urged before this Court in either of those cases, so far as we can ascertain.

The effect of the statutory provision allowing appeals in proceedings under Section 17 does not seem to have been commented on by this Court.

The Custodian, if we understand aright, claims, and the lower Courts in the case at bar seem to have agreed with him, that any proceeding the Custodian can bring under Section 17 is a purely possessory proceeding. Otherwise the present proceeding is earmarked as of a different character. If the Custodian is right in his contention, then the statute expressly gives the right of appeal in these purely possessory cases. And it follows that Section 17 of the statute itself provides that defenses to such proceedings may be raised.

This Court has itself recognized that in the stress of war it is not always possible to give to questions of constitutional law the careful and

patient consideration they deserve, and that it is well to return to such questions when unmoved by war's alarms.

Ex parte Milligan, 4 Wall. 2, 109.

The Court naturally, and justly, leans against any curtailment of governmental powers, not directly imposed by the terms of the Constitution, which might restrict vigorous and effective action in war.

But the Court will lean, equally naturally and justly, against disturbance of the foundation principles of our liberties, won and preserved by a thousand years of blood and tears, and expressly guaranteed by the constitutional limitations on the powers of the Federal government, included in the first ten amendments.

This Court for over half a century has recognized that there are powers which the government, if hard pressed, might seek to exercise, under stress of war, which the founders of our government had insisted and provided that the Federal Government should not have.

Ex parte Milligan, 4 Wall. 2, 120-121.
United States vs. *Cohen Grocery Co.,* 255 U. S. 81, 88;

No real necessity of avoiding these plain provisions exists or has existed.

The power and effectiveness of the Government in war does not depend on saying that every Federal Court must issue a warrant for the seizure of private property as enemy property, if demanded by an Alien Property Custodian, though he admit that it is not enemy property,

and that there is no probable cause for believing it to be such. And however terrible the "efficiency" of the German Government appeared, efficiency of application of power is not the only or even the greatest element in waging successful war.

The struggle from which we have emerged, if rightly read, teaches again the old lesson that despotic efficiency of control, is a less factor in war power than the might of free-men, whose freedom grows out of absolute limitations on governmental powers.

"England always muddles through." She "muddles," as did we, because she has not the efficiency which a more despotic form of government so easily brings to bear. But she muddles *"through"* because she has not had the efficiency of despotism to dry up the sources of power she finds in her free-men who have from birth had rights that no government may gainsay.

It is of far greater worth to preserve those sources of the power of a great nation of free-men, than to provide for efficiency in the use of power, by destroying the individual freedom and individual rights as against any government either in war or in peace, the existence of which rights goes to build up the power and the independence of free-men.

POINT XIX.

Upon the admitted facts at bar Wesche was entitled to intervene and to a refusal of the final decree sought by the Custodian.

In no previous case have any such conditions as those presented here been before the Courts.

No probable cause was even pretended to be shown to the Court to believe that Wesche's property was enemy property or rightfully subject to capture. The Custodian admitted that he had never had probable cause to believe it enemy property, and that it was not enemy property or the property of Mrs. von Schierholz. He made no direct allegation that he or his predecessor had determined the ownership of the property after investigation, and admitted the facts which showed that the demands he had made were unconstitutional when made as to Wesche's property and Ahrenfeldt's. He admitted even that Mrs. von Schierholz had a status entitling her to immediate return of her own property.

And in the face of that situation, months after the war has been completely terminated, he demands that this Equity Court, disregarding the IV Amendment, issue its warrant and decree for the conveyance of this property to him, and refuse to listen to the protestations of Wesche that before it can, in time of peace, issue a warrant for the delivery of his property it must require some showing of probable cause for its seizure.

POINT XX.

The decree refusing leave to intervene should be reversed and the final decree ordered opened to allow this appellant to interpose its answer, and the relief sought by the Custodian denied.

SELDEN BACON,
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New York City.

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In the Supreme Court of the United States

OCTOBER TERM, 1922.

FREDERICK WESCHE, APPELLANT, *v.* THOMAS W. MILLER, AS ALIEN PROPERTY Custodian.	No. 292.
COMMERCIAL TRUST COMPANY OF NEW Jersey, appellant, *v.* THOMAS W. MILLER, AS ALIEN PROPERTY Custodian.	No. 575.
CHARLES J. AHRENFELDT, APPELLANT, *v.* THOMAS W. MILLER, AS ALIEN PROPERTY Custodian.	No. 576.

(Consolidated Cases.)

NO. 292, APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY; AND NOS. 575 AND 576, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN.

HISTORY OF THE CASES.

PLEADINGS.

This action was begun by petition filed by Francis P. Garvan as Alien Property Custodian, wherein he alleged in substance that on or about December 19,

1917, the respondent Commercial Trust Company of New Jersey, acting in compliance with section 7 (a) of the Trading with the Enemy Act, filed a report that it held certain securities and money "in trust for the joint account of Frederick Wescle, of Paris, France, and Helene J. von Schierholz, of Plaue, Thuringen, Germany, to be delivered or paid to the said cestuis que trustent upon the demand of either, or of the survivor of them," which report was filed as Exhibit A to the petition; that on or about March 28, 1919, said respondent corporaton reported to the Custodian by telegraph that it held for the benefit of the said cestuis que trustent the further sums of $39,190.76, designated as a checking account, and $18,159.69, designated as a trust account; that on or about June 19, 1918, A. Mitchel Palmer, as Alien Property Custodian, the petitioner's predecessor, determined that the said Helene J. von Schierholz was an enemy within the purview and meaning of the said Act, and therefore required the said respondent corporation to forthwith deliver to the Custodian all the property described in said reports; that said demand was served on said trust company on or about July 8, 1918, a copy of said demand being filed as Exhibit B; that on or about March 28, 1919, the petitioner further required the said trust company to deliver to him as Alien Property Custodian the said moneys and other properties, which demand was served on or about April 17, 1919, a copy of said demand being filed as Exhibit C, and that by virtue of said demands the petitioner was

vested with all the benefits in said money and other property; and it was prayed that the court issue a rule commanding in the alternative that the respondent deliver said properties to petitioner or, upon a day to be designated in said return, to show cause, if any there be, why the relief prayed for should not be granted. (Wesche Rec. 3–8; Com. Tr. Co. Rec. 2–5; Ahrenfeldt Rec. 2–5.)

In Exhibit A, the report of the Commercial Trust Company of New Jersey to the Custodian, it is recited that the name of the enemy interested in the trust fund was Helene J. von Schierholz, whose address was Schloss Plaue Thuringen, No. 3 Plaue, Thuringen, Germany; that the name of another person interested with Mrs. Schierholz was Fr. Wesche, whose last-known address was 130 Fauborg Street, St. Denis, Paris, France, whose interest was derived from the trust agreement attached to the report; and that on January 30, 1913, there was received for the account of Frederick Wesche, of Paris, France, and Helene J. von Schierholz, of Plaue, Thuringen, Germany, the bonds set out in the schedule annexed, having a par value of $524,000, "to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said

bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them." (Wesche Rec. 16–18; Com. Tr. Co. Rec. 9, 10; Ahrenfeldt Rec. 9, 10.)

In the demand for the property made by Palmer as Custodian which is filed as Exhibit B to the petition it is recited that the Custodian "after investigation do determine that the following property, to wit: [describing it], is by you owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of Helene J. von Schierholz, address: Schloss Plaus Thuringen, No. 3 Plaue, Thuringen, Germany, whom after investigation I do determine to be an enemy not holding a license granted by the President." (Wesche Rec. 31, 33, 34; Com. Tr. Co. Rec. 17–19; Ahrenfeldt Rec. 16–19.) This demand was served on July 8, 1918. (Wesche Rec. 34, 38; Com. Tr. Co. Rec. 17, 19; Ahrenfeldt Rec. 17, 19.)

In the demand for the property made by Garvan, Custodian, which is filed as Exhibit C to the petition, it is recited that the Custodian "after investigation do determine that Helene J. von Schierholz, whose address is Schloss Plaus Thuringen, No. 3 Plaue, Thuringen, Germany, is an enemy (not holding a license granted by the President) and that the following property, right claim, or chose in action to wit: [describing the property], is by you

owing and held for, on account of, on behalf of and for the benefit of the said enemy." (Wesche Rec. 35–38; Com. Tr. Co. Rec. 20–22; Ahrenfeldt Rec. 20–22.) This demand was served on April 17, 1919. (Wesche Rec. 40; Com. Tr. Co. Rec. 23; Ahrenfeldt Rec. 23.)

Commercial Trust Company filed an answer on February 21, 1921, in which it admitted having made to the Custodian the report with reference to the property in question and its ownership as alleged in the petition (Wesche Rec. 42; Com. Tr. Co. Rec. 24; Ahrenfeldt Rec. 24); and the substance of the defense set up therein is as follows:

(1) That Palmer, as Custodian, neither personally nor otherwise made at any time investigation or determined after investigation that the securities and moneys mentioned in Exhibit B to the petition were either owing to or belonging to or held for, by, on account of, or on behalf of, or for the benefit of Helene J. von Schierholz, and that no investigation was made aside from receiving the report filed by the respondent, and that his decision was based solely upon recitals in said report, when at the same time the report showed that Frederick Wesche was both an owner and holder at law and interested as beneficial owner in the securities and moneys described in said report. (Wesche Rec. 44, 45; Com. Tr. Co. Rec. 25, 26; Ahrenfeldt Rec. 25.)

(2) That neither the said Palmer nor the petitioner ever inquired of said Wesche or anyone representing

him as to his rights or the rights of any other persons in said securities and moneys. (Wesche Rec. 45; Com. Tr. Co. Rec. 26; Ahrenfeldt Rec. 25, 26.)

(3) That the Alien Property Custodian secretly and without evidence, and without making investigation, and contrary to the information in his possession and to the proofs before him of the right of said Wesche, and in fraud of the rights of Wesche and Ahrenfeldt, both of whom resided abroad and to whom no recourse to any court was afforded, fraudulently pretended that he had duly investigated and had personally examined and passed on evidence obtained by an investigation of the rights and interest in such securities and moneys, and had fraudulently pretended to have determined after examination and investigation that said Wesche had no rights in such securities and moneys; and that the same belonged exclusively to said Helene J. von Schierholz. (Wesch Rec. 47, 48; Com. Tr. Co. Rec. 27; Ahrenfeldt Rec. 26.)

(4) That any such pretended holding was null and void, and did not constitute due process of law; that it was an attempt to deprive said Wesche and the other owners of their property without due process of law, and to take their said property for public use without compensation or opportunity to be heard, against the Fourth and Fifth Amendments to the Constitution of the United States; that such action was in excess of any powers that the Congress and the President could confer on the Custodian, and was

contrary to the provisions of the Trading with the Enemy Act and amendments thereto, and was contrary to any authority conferred by the President upon the Custodian under the provisions of said Act. (Wesche Rec. 48, 49; Com. Tr. Co. Rec. 27; Ahrenfeldt Rec. 28.)

The answer then states in detail the alleged facts with reference to the property in question and the citizenship of its owners, the substance of which is, that Frederick Wesche and Charles Ahrenfeldt were for years business associates; that said Ahrenfeldt died in 1893 and left an estate of large value to his three children to wit, Charles J. Ahrenfeldt, Helene J. Von Schierholz (née Ahrenfeldt), and Lucy Von Uxküll-Gyllenband (née Ahrenfeldt); that Charles J. Ahrenfeldt has at all times been an American citizen, and that since August 1, 1914, he has resided in England, France, or Switzerland, and has never been an enemy of the United States, and has not since August 1, 1914, been a resident of any judicial district of the United States (Wesche Rec. 55; Ahrenfeldt Rec. 30; Com. Tr. Co. Rec. 30, 31); that Mrs. Helene J. von Schierholz was an American citizen till the time of her marriage to Arthur von Schierholz, a German subject, on July 24, 1879; that her said husband died in January, 1899, and that she had been domiciled in Germany ever since April 6, 1917, and that prior to the passage of the act of June 5, 1920, she was without a license to deal with the properties in question save only such license as was given by

proclamation in 1919 (Wesche Rec. 50, 51; Ahrenfeldt 28; Com. Tr. Co. Rec. 28, 29); that Lucy Von Uxküll-Gyllenband was a citizen of the United States until she married a German subject about 1885, from whom she was divorced but married another German subject, Woldemar Von Uxküll-Gyllenband, in 1897, and had ever since resided in Germany (Wesche Rec. 55; Ahrenfeldt Rec. 30; Com. T. Co. Rec. 30, 31); that prior to January 30, 1913, Charles J. Ahrenfeldt, Mrs. Schierholz, and Mrs. Uxküll-Gyllenband had placed in Wesche's hands securities which had been derived from their father's estate with the understanding that, with the approval of said Ahrenfeldt, they might be reinvested by Wesche along with funds belonging to himself, and that while the amount of said properties should be kept several, yet the cash might be carried in the name of Wesche; that in 1913 it was agreed that certain securities and some cash then belonging to said parties but held by Wesche should be deposited by Wesche with the trust company in the joint name of Wesche and Mrs. Schierholz, each possessing the power to withdraw the same, but with the understanding and agreement between said four parties that Mrs. Schierholz should exercise such power only in case of disability of said Wesche, and then only with the responsibility to return to each his or her share thereof; that pursuant to that arrangement on January 30, 1913, said Wesche and Mrs. Schierholz entered into an agreement with the trust company, which was filed as Exhibit 60 to the answer (Wesche Rec. 56–58; Ahrenfeldt Rec. 31, 32;

Com. Tr. Co. Rec. 31, 32), which agreement or receipt was as follows:

> RECEIVED, Jersey City, January 30, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed and having a par value of five hundred and twenty-four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2 per cent of the amount so collected; *this* receipt is executed in triplicate. (Wesche Rec. 80; Ahrenfeldt Rec. 43, 44; Com. Tr. Co. Rec. 44)

A statement of the securities and cash owned by each of said parties and held by the trust company is then made. (Wesche Rec. 63–69; Ahrenfeldt Rec. 33–37; Com. Tr. Co. Rec. 33–37.)

APPLICATION OF FREDERICK WESCHE.

Frederick Wesche presented a petition praying that he be permitted to intervene and file an answer to the petition of the Custodian (Wesche Rec. 91; Com. Tr. Co. Rec. 50; Ahrenfeldt Rec. 50), and he presented along with his petition an answer which set up in substance the same facts as those alleged in the answer filed by the trust company (Wesche Rec. 95–140; Com. Tr. Co. Rec. 52–74). This application was disallowed (Wesche Rec. 166; Com. Tr. Co. Rec. 113).

APPLICATION OF CHARLES J. AHRENFELDT.

Charles J. Ahrenfeldt also presented a petition seeking permission to intervene and file an answer. (Ahrenfeldt Rec. 50; Com. Tr. Co. Rec. 77.) He presented with his petition an answer setting up the same facts as those stated in the answer filed by the trust company. (Ahrenfeldt Rec. 52–73; Com. Tr. Co. Rec. 79–100.) This application was denied. (Ahrenfeldt Rec. 79, 80; Com. Tr. Co. Rec. 106–107.)

ORDERS AND JUDGMENTS OF THE COURTS.

The Alien Property Custodian moved to strike out the answer of the trust company, which motion was denied. (Wesche Rec. 167, 168; Com. Tr. Co. Rec. 115; Ahrenfeldt Rec. 87.) On the hearing the Government introduced the exhibits filed with the petition, which consisted of (1) the report of the trust company to the Custodian, (2) the formal demand of A. Mitchell Palmer, Custodian, which recited the fact

of his having made an investigation and determination, and (3) the formal demand of the petitioner Garvan, which contained the recital of his investigation and determination as to the ownership of the property, and that it was held for an alien enemy. (Wesche Rec. 142–145; Com. Tr. Co. Rec. 101, 102; Ahrenfeldt Rec. 74, 75.) The facts alleged in the trust company's answer relating to the ownership of the beneficial interest in the property appear to have been treated as being admitted by the attorneys representing the Custodian. (Wesche Rec. 148, 169; Com. Tr. Co. Rec. 104, 116; Ahrenfeldt Rec. 77, 85.) The court on final hearing ordered that the Commercial Trust Company convey, transfer, assign, deliver, and pay over to Thomas W. Miller, Custodian, who had by previous order been substituted as petitioner, the securities and moneys described in the petition. (Wesche Rec. 170; Com. Tr. Co. Rec. 116; Ahrenfeldt Rec. 88.)

The ground upon which this order was primarily based appears from the following quotation from the memorandum opinion filed by the court:

> However, while the making of such determinations and demands with reference to the properties in question is not disputed, it is insisted that the preliminary investigation required by the Act was not made. But this challenge is met by the positive assertion in the determinations and demands that investigation was made. This precludes any further inquiry in proceedings like the present, instituted under Section 17 of the Act, which are

merely possessory. *Central Union Trust Co. of N. Y.* v. *Garvan*, U. S. — (decided Jan. 24, 1921); *Stoehr* v. *Garvan*, supra.

The Trust Company also claims that at most but a part of this property is owned by Mrs. von Schierholz, and that a proper investigation would have revealed that fact. Under the trust agreement herein set out the Trust Company held the securities therein referred to and the interest money to be derived therefrom, in trust "for the joint account of the said Frederick Wesche and Helene J. von Schierholz," and it was obligated to deliver or pay over such securities and interest "to either the said Frederick Wesche or to the said Helene J. von Schierholz, or to the survivor of them." So far as the Trust Company was concerned, it made no difference what were the relative rights of the cestius que trustent in and to these moneys and securities. It was bound to deliver them to either on demand. This being so, if either of these persons was an enemy within the meaning of the Trading with the Enemy Act, the Alien Property Custodian, by taking the requisite steps under the Act, which he did, would be substituted in the place of the enemy, and entitled to demand and recover the trust fund.

And again:

In the instant case the Trust Company's report to the Custodian showed that Mrs. von Schierholz was a resident of enemy territory, and that under the trust agreement she had a right to demand of the Trust Company that

> the moneys and securities in question be turned over to her. On that report alone the Custodian could justly determine that the properties were held for an enemy. Having so determined, his right to secure them can not be resisted or questioned by the Trust Company. This conclusion renders it unnecessary to consider any of the other grounds stated in the answer or briefs. (Wesche Rec. 160–162; Com. Tr. Co. Rec. 110, 111; Ahrenfeldt Rec. 83, 84.)

An appeal to this court was prosecuted by Wesche from the order of the court disallowing his intervention, and he has filed an assignment of errors which contains 95 specifications. (Wesche Rec. 175–202.)

The Commercial Trust Company prosecuted an appeal to the United States Circuit Court of Appeals, and there assigned 83 grounds of error. (Com. Tr. Co. Rec. 119–130.) The judgment of the district court was affirmed by that court, the court holding that in the cases of *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, and *Stoehr* v. *Wallace*, 255 U. S. 239, all the questions involved had been determined, except whether the fact that Wesche, who was not an alien enemy, and Mrs. Schierholz, who was an alien enemy, each had the power upon his or her sole order to withdraw the property, made any distinction, and the court agreed with the district court that—

> the property in question being held for the joint account of a neutral and an alien enemy,

> and being in one aspect under the sole control of the alien enemy as to is [its] withdrawal, possession, and disposition, it was properly regarded, in this initial proceeding, as enemy-owned property liable to seizure by the Alien Property Custodian. Therefore, neither for itself as trustee nor for either cestui que trustent was the Trust Company justified in withholding a delivery of the property under the Act as it was passed and amended. (Com. Tr. Co. Rec. 148–149.)

The court further held that the Act as originally passed and amended has not been repealed or otherwise affected by the Armistice, the Peace Resolution of Congress, or the Treaty with Germany. (Com. Tr. Co. Rec. 147–149.) From the judgment there pronounced an appeal was taken to this court, and 95 grounds for error have been assigned, which present the same questions as those presented in the assignments of error filed by Wesche. (Com. Tr. Co. Rec. 150–162.)

Charles J. Ahrenfeldt took an appeal from the decree of the court disallowing his application for intervention to the United States Circuit Court of Appeals, and there filed 95 specifications of error which presented the same questions as those presented in the assignments of error filed in this court by Wesche and the trust company. (Ahrenfeldt, Rec. 91–104.) The judgment of the district court was affirmed, the circuit court of appeals holding that the district court was right in "holding that the questions sought to be litigated by Ahrenfeldt can be

raised only after the demand of the Alien Property Custodian has been complied with, and then only by proceedings authorized by section 9 of the act, as amended June 5, 1920," citing *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, and *Stoehr* v. *Wallace*, 255 U. S. 239. (Ahrenfeldt Rec. 119.) From the judgment of the Circuit Court of Appeals an appeal was prosecuted by Ahrenfeldt to this court, and 98 specifications of error have here been filed which raise the same questions as those presented in the Court of Appeals. (Ahrenfeldt Rec. 120–134.)

BRIEF AND ARGUMENT.

I.

The Provisions in Question of the Trading with the Enemy Act Are Constitutional.

The question as to the constitutionality of the Act was raised and determined in *Stoehr* v. *Wallace*, 255 U. S. 239, 243, 244. However, it is here insisted by Wesche and Ahrenfeldt that that case is not conclusive because, when it was determined by the Custodian that the property belonged to or was held for, or on account of, an alien enemy and when demand was made for its delivery to the Custodian, they were residing, one in Switzerland, and the other in France, and no provision was made in the Act for the institution of a suit for the recovery of property by a claimant who was a nonresident of the United States.

The transactions which are material to the question here presented were had upon the following dates:

The determination by Palmer, Custodian, as to the ownership of the property or for whom it was held was made on June 19, 1918, and the demand was served on the 8th of July, 1918. (Wesche Rec. 34.) The determination of the ownership, etc., of the property by Garvan, Custodian, was made on March 28, 1919, and the demand was made on April 17, 1919. (Wesche Rec. 40.) The original petition was filed September 11, 1920. (Wesche Rec. 40.) The provision in Section 9 of the original Act (40 Stat. Ch. 106, Sec. 9, p. 420) relating to the institution of suits by a claimant was as follows:

> If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, etc. (40 Stat. page 420.)

On July 11, 1919, said Section 9 was amended so that the above provision read as follows:

> If the President shall not so order within sixty days after the filing of such application

> or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity *in the Supreme Court of the District of Columbia* or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed. (41 Stat. page 35.)

The contentions of Wesche and Ahrenfeldt can not be sustained for the following reasons:

1. They had a right before the amendment of July 11, 1919, to bring suit against the Alien Property Custodian in the District of Columbia, because the Alien Property Custodian resided, and his office was located, in that district.

The main purpose of the provision above quoted from Section 9 of the original Act was to provide a method for the recovery of property improperly seized, and the declaration as to the forum in which such action might be brought was merely an incident to that purpose. If the Act had said nothing about the jurisdiction within which the suit might be instituted it would have been controlled entirely by the general statute relating to the venue of actions; and the jurisdiction for all actions brought by claim-

ants would have been in the District of Columbia, as that was the official residence of the Custodian; but for the convenience of the claimants it was provided that they might institute suits in their own districts. That provision of course had no application to those who were residing abroad; and therefore the jurisdiction as to them was fixed by Section 51 of the Judicial Code, which provides that, except as provided in the six succeeding sections, "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

2. When this action was brought by the Alien-Property Custodian the statute had been so amended as to specifically give both Wesche and Ahrenfeldt the right to sue for the property in the District of Columbia.

As above stated, the statute amending the original Act in that particular was passed on July 11, 1919, while the petition in this case was not filed until September 11, 1920. (Wesche Rec. 40.) The property in question still remained in the possession of the Commercial Trust Company, and Wesche and Ahrenfeldt certainly had no right of action until it was removed from its possession. Therefore, if there had ever been any merit in their contention, the question had become a moot one before this action was instituted. So far as the trust company was concerned, by the express terms of the original statute it had a right to maintain a suit in the district wherein it was a resident; and that company therefore could not

question the constitutionality of the Act on the ground that it was not afforded the right to prosecute a suit for the return of the property.

3. The Commercial Trust Company was holding the property claimed by Wesche and Ahrenfeldt as their trustee, and it was its duty to protect and preserve the property for them; and said company had the right when the demand was made by the Custodian to maintain an action for its return for the benefit of Wesche and Ahrenfeldt in the district of which it was a resident.

II.

Neither the Commercial Trust Company, Wesche, nor Ahrenfeldt Can Have Adjudicated the Question of the Ownership of, or Rights in, the Property Before It Has Been Delivered to the Custodian.

As heretofore shown in the statement of the case, it was determined by both Palmer, Custodian, and Garvan, Custodian, that the property in question was owned by or held for the account of Mrs. Schierholz, an alien enemy not holding a license from the President, before the demand was made upon the trust company for the property.

While the answer of the trust company denies that such determination was based on any real investigation, yet it conclusively shows that sufficient information had been imparted to the Custodian to warrant such determination, as the trust company itself had reported to the Custodian that it was holding the property subject to the order of either Wesche or

Mrs. Schierholz, and that Mrs. Schierholz was an alien enemy. Whatever the actual facts may be, the case of *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, has conclusively settled this question in favor of the United States. In that case the defense interposed by the trust company was that it held the funds in question for the security and benefit of American policyholders and creditors. The court refused to consider any such question, holding that it could not be raised by the trust company until it had delivered the property to the Custodian. Here the trust company claims that it was holding certain portions of the property in trust for American citizens; and therefore precisely the same question is presented as the court had before it in that case.

The fact that Wesche had equal power with Mrs. Schierholz to withdraw the property does not render the principle inapplicable. The provision of the statute relating to the ownership of the property reads as follows:

> If the President shall so require, any money or other property owing or belonging to *or held for, by, on account of, or on behalf of, or for the benefit of* an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian. (40 Stat., Ch. 106, sec. 7, subsec. (c), p. 418.)

Certainly the property in question was being "held for, by, on account of, or on behalf of, or for the benefit of" Mrs. Schierholz, as she had the power to demand and receive all of the property from the trustee. If it were not so held for her, it was not so held for Wesche; and appellants' contention leads to the absurd conclusion that it was not held by the trust company for anyone. Furthermore, as held by the court of appeals, the Custodian had the right to be substituted for Mrs. Schierholz; and as she had the right to demand the delivery to her of the entire property, when the demand for the property was made by the Custodian an equal right was vested in him. Anyway, it was determined by the Custodian that the property was held for Mrs. Schierholz, an alien enemy without a license; and that determination is conclusive of the case.

III.

The Right of the Custodian to the Possession of the Property Was Not Affected by the Armistice, or by the Termination of the War by Resolution of Congress and Proclamation of the President.

This question was before the Circuit Court of Appeals for the Second Circuit in *The Matter of the Application of Thomas W. Miller*, 281 Fed. 764, and the contention of appellants can not be better answered than by quoting the language of the court in that case, as follows:

> But it is said that the Custodian's right to seize the property was a war-time power which lapsed with the passing of a state of

war, and that on November 11, 1918, an armistice was entered into between the armed forces of the United States and those of the then Imperial German Government, and that on July 2, 1921, there became effective a joint resolution of Congress approved and signed by the President, which declared the state of war formerly existing with the Imperial German Government to be terminated and at an end. This, it is said, rendered of no force or effect as to subsequent matters any prior determinations by the Alien Property Custodian to the effect that Helene Kyriss and Amalia Janner or either of them was or is an alien enemy; that the said Amalia Janner and Helene Kyriss are not alien enemies and that neither of them is an alien enemy and that each of them is a citizen or subject of a country with which the United States of America is at peace and is entitled to all the protection to her property rights to which any alien is entitled within the United States, and also is entitled to all protection, rights, privileges, and immunities, both as to personal and property rights appertaining to citizens or subjects of Prussia or of the sovereignty succeeding to the rights and place of Prussia under the treaties between Prussia and the United States.

We are unable to assent to the proposition. It is difficult to appreciate the reasoning upon which it is based. So long as the United States was officially at war the courts can not say that it was in reality at peace. The joint

resolution of Congress adopted July 2, 1921, declared the war at an end. (42 Stat. 105.) And on November 11, 1921, the President issued his Proclamation in which he declared "that the war between the United States and Germany terminated on July 2, 1921." Under the definition of the "end of the War" contained in the Trading with the Enemy Act, July 2, 1921, must be regarded for the purposes of that Statute as the termination of the war.

On March 3, 1921, Congress passed a joint resolution declaring that the date of the passage of the resolution in the interpretation of any provision relating to the duration or date of the termination of the war should be treated as the date of the war's termination, excepting, however, from the operation and effect of the resolution certain Acts and among them the Act known as the Trading with the Enemy Act, and all amendments thereto.

The Congress thereafter passed a further Joint Resolution which the President approved on July 2, 1921. It declared that the state of war existing between the United States and Germany was at an end, but that resolution specifically provided in Section 5 as follows:

"All property of * * * German nationals which was on April 6, 1917, in or has been since that date come into the possession or under control of or has been the subject of a demand by the United States of America, or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof

made, except as shall have been heretofore or specifically hereafter shall be provided by law, until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims." (42 Stat. 106.)

As the demands made by the Custodian, and upon which this proceeding was instituted, were made after April 6, 1917, and prior to the adoption of this resolution, the Custodian's right to the possession of the property demanded may still be enforced.

In *Kahn* v. *Anderson*, 255 U. S. 1 (41 Sup. Ct. 224; 65 L. Ed. 469), the Supreme Court declared that it was not disputable that complete peace had not come to pass by the effect of the Armistice and the cessation of hostilities. And Chief Justice White, speaking for the court, said it was difficult to appreciate the reasoning upon which it was insisted that although the Government was officially at war, nevertheless so far as the regulation of the army was concerned it was at peace.

In *Vincenti* v. *United States* (C. C. A.), 272 Fed. 114, the Circuit Court of Appeals for the Fourth Circuit, construing the words "the conclusion of the present war," held that the Government was still at war at the time of its decision, which was on March 4, 1921. The Supreme Court refused a writ of certiorari. (256 U. S. 700; 41 Supt. Ct. 538; 65 L. Ed. 1178.) And if a state of war legally existed on March 4, 1921, the seizure or demand by the Custodian made upon the trustees on February 4, 1921, was a legal seizure or demand

under the Trading with the Enemy Act, which Act did not expire until five months later.

For the foregoing reasons, the judgment of the District Court in No. 292 and the judgments of the Circuit Court of Appeals in Nos. 575 and 576 should be affirmed.

JAMES M. BECK,
Solicitor General.
JAMES A. FOWLER,
Special Assistant to the Attorney General.

MARCH, 1923.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

FREDERICK WESCHE, Appellant, v. THOMAS W. MILLER, as Alien Property Custodian.	No. 292.
COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant, v. THOMAS W. MILLER, as Alien Property Custodian.	No. 575.
CHARLES J. AHRENFELDT, Appellant, v. THOMAS W. MILLER, as Alien Property Custodian.	No. 576.

(CONSOLIDATED CASES.)

No. 292, APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY; AND NOS. 575 AND 576, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR APPELLANTS.

We call attention to a mistake of fact on the part of counsel for the appellee.

Through obvious inadvertence he states at pages 10-11 of his brief that:

> "On the hearing the Government introduced "the exhibits filed with the petition which con- "sisted of (1) the report of the trust com- "pany of the Custodian, (2) the formal de- "mand of A. Mitchell Palmer, Custodian, "which recited the fact of his having made "an investigation and determination, and (3) "the formal demand of the petitioner Garvan, "which contained the recital of his investiga- "tion and determination as to the ownership "of the property, and that it was held for an "alien enemy."

In this statement he falls into three errors. None of the documents mentioned were filed with the petition. Annexed to the petition were papers alleged to be copies of such documents, but the correctness of the copies was challenged.

Document (1) mentioned by him was introduced in evidence.

Neither document (2) nor document (3) was introduced or offered in evidence. And this is distinctly and in terms set forth in the "Statement of all evidence and proceeding at the Hearing" settled by the District Judge who heard the cause. The statement shows that the Custodian introduced in evidence the original report by the Trust Company (his document [1]), and a subsequent letter from it, which is set out in full, and the statement then proceeds:

> "Aside from the submission of said two "papers the petitioner introduced no further "evidence and rested."

(Com. Trust Co. Record, pp. 101-103; Wesche Record, pp. 141-145; Ahrenfeldt Record, pp. 74-76.)

The omission to offer these demands (2) and (3) was in fact one more indication of the character of the proceeding here before the court.

Argument in Reply.

The brief of the appellee is most noticeable for its omissions. It offers no reply to our contention that the present proceeding, instituted in equity, was not a purely possessory one such as those this Court considered in *Commercial Trust Co.* vs. *Garvan,* 254 U. S. 554, but distinctly petitory in character; and it contains no reference to the radical differences between the petition here and the petitions in those cases. Those features and their consequences are taken up and discussed under Points XI and XII of our main briefs.

Save for the erroneous statement concerning the evidence introduced by him, to which we have called attention, the appellee makes no attempt to contend that he produced any evidence before the Court that any determination had been made by either Custodian or any investigation. He does not take up in any way the question of necessity of such prior investigation to give any life to the Custodian's determination, and does not dispute that the alleged determinations were not made by the Custodian personally.

The appellee confines his argument to three points. Each of these three points and each of the subdivisions under his first point involve *non-sequiturs,* and no one of them meets even the corresponding contention that has been made on behalf of the appellants.

We take up the appellee's contentions briefly, numbering our replies in conformity with the appellee's points to which they are directed.

POINT I.

The objections raised to the constitutionality of the Trading With the Enemy Act, when sought to be made applicable here to the cases of Ahrenfeldt and Wesche, were well taken.

Counsel for the appellee has not questioned the general doctrine expressly declared by the Circuit Court of Appeals and impliedly declared by this Court in *Central Trust Co.* vs. *Garvan.*

> "If persons not alien enemies, or allies of "alien enemies were given no means to "protect their interests in such property "the seizure would be unconstitutional as "without due process of law."
>
> *Garvan* v. *$20,000 Bonds,* 265 Fed. 477, 479.
>
> *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 566.

But he seeks to avoid its consequences by three arguments which we meet respectively as follows:

1) *Prior to the amendment of July 11, 1919, suit could not be instituted in the District of Columbia against the Custodian by virtue of the provisions of the Judicial Code, to recover property wrongfully seized by him.*

His first sub-point, that the failure to provide in the Act, until July 11th, 1919, for the suit in any Court save the United States District Court for the District in which the claimant resided,

did not prevent the bringing of suit in the District of Columbia under Section 51 of the Judicial Code, is clearly untenable.

By Section 9 of the Trading With the Enemy Act it was expressly and in terms provided:

> "Except as herein provided the money or "other property conveyed, transferred, as- "signed, delivered or paid to the Alien Prop- "erty Custodian *shall not be* liable to lien, "attachment, garnishment, trustee process or "execution, *or subject to order or decree of "any court.*"

It is thus not a case of mere failure to provide, but of affirmative prohibition of proceeding under other acts.

2) *The subsequent amendment of the Trading With the Enemy Act on July 11, 1919, did not relieve constitutional defects of the original demands made before that date, so as to render them valid.*

As to this point we need only refer to the full discussion under Point X of the main brief on the appeal of Wesche, No. 292.

The argument there advanced remains unanswered.

3) *The Commercial Trust Company had no standing to bring a proceeding to reclaim the property if it once delivered it to the Custodian.*

If the Trust Company surrendered property in response to a demand therefor by the Custodian, the delivery by virtue of Section 7, e) of the Act would be a full acquittance and discharge of the Trust Company *for all purposes of its obligation.*

A proceeding to recover the property under the provisions of Section 9, could be maintained only by a party having an interest for his own interest. After delivery and discharge from all obligation the Trust Company could have no interest authorizing it to maintain such a proceeding for the benefit of any other person.

POINT II.

Lack of right to adjudication of the ultimate rights of the claimants cannot obviate the necessity of the Custodian showing probable cause in order to obtain the aid of the Court.

If we had made ourselves entirely clear in the main brief the appellee would have seen that our main briefs presented the following contentions:

If the present proceeding was not a purely possessory one but petitory in its nature (as contended in our main briefs Points XI and XII) the appellee's present point is obviously unsound.

But if this was a purely possessory proceeding the appellee's Point II is still wholly beside the mark.

Assuming the proceeding to be a purely possessory one, permitting no issue on the ultimate rights, still the Court had no power to issue such a warrant as the Custodian asked "but upon probable cause supported by oath or affirmation."

The brief for the Custodian confuses the two distinct things: establishing probable cause and proceeding to final determination of the rights of the parties.

If the Custodian had shown probable cause (other outside questions being laid aside), under the rule established by this Court in *Central Trust Co.* vs. *Garvan* issue could not have been taken as to the correctness of his showing and required to be tried out in a purely possessory proceeding, any more than the general merits of an action could be tried out on a motion to vacate an attachment, or statutory writ of replevin.

But, since the Custodian failed to show *probable cause* supported by oath or affirmation, the Court, even without deciding the rights of the parties, was bound to refuse to aid him by the issue of a warrant.

The question whether he had shown "probable cause" was open on this application, just as a preliminary motion to vacate a writ of attachment or replevin would lie for the fatal lack of a showing of jurisdictional matters in the plaintiff's own papers.

Determination whether the Custodian has shown probable cause is a totally distinct matter from finally adjudicating the rights of the parties.

The two distinct matters of final determination and showing probable cause are not to be confused, simply because the Custodian in addition to admitting that he *had not shown probable cause*, also admitted that there wasn't a possibility of his doing so, and that the property of Wesche and Ahrenfeldt not only did not appear to be, but actually was not enemy property.

To say that there cannot be final adjudication of rights in the proceeding is no answer to the objection that the Custodian wholly failed to make the showing of probable cause, which was required before a warrant could issue.

POINT III.

If the original demands were not valid when made, they could not be made valid by new decision or decree for delivery after the declaration of peace on July 2nd, 1921.

The contention made by the appellee as to the Peace Resolution and the Peace Treaty suggests that we failed to make our main point on this subject clear to his counsel, and may have correspondingly failed to make it clear to this Court.

Our prime contention on this point is that the original demands, so far as they affected property of Wesche and of Ahrenfeldt, were unconstitutional when made and void, that they could not be given a validity as a seizure, which they had not acquired before the end of the war, by a decision and decree first given after the war had come to an end, and the right of capture been terminated; especially as no attempt to claim their interests had been made.

In the case of *Matter of Miller*, 281 Fed. 764, cited by appellee, the demands relied on were of property belonging respectively to the two appellants. As to each of them it was admitted that a demand, valid when made, of their interests, had been made by the Custodian before the end of the war and such demand existed irrespective of any decree entered after the conclusion of war. Here the condition is entirely different and the question here presented was not in that case presented or passed upon.

In that case it was, however, admitted that one of the two appellants was a woman who stood in

the same position of being an American woman, who had married a German, as were Madam von Schierholz and Madam von Uxküll-Gyllenband. On that ground the Custodian in that case consented that the decree for delivery as to her property should be reversed and it was reversed.

Here the only person whose property was demanded was Mrs. von Schierholz and admittedly she came under the provisions of Subdivision 3) of Section 9a of the Trading With the Enemy Act, if not as it stood June 5th, 1920, certainly as amended on February 27th, 1921.

Nevertheless, it is on the sole foundation of a demand of property as that of Mrs. von Schierholz, an American woman, entitled to the return of her property, that the Custodian in this case seeks after the war to enforce delivery to him of property, which he, in open court, admitted was not hers but belonged to other persons, for delivery of whose property as such, he had made no demand and had no foundation for making any. The decision in *Matter of Miller*, 281 Fed. 764 does not sustain any such doctrine.

The three points thus advanced by the appellee fail to sustain his contentions or to obviate the contentions of the appellants, and their points remain practically unanswered.

Respectfully submitted,

SELDEN BACON,
Counsel for Appellants in
Nos. 292, 575 and 576.

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. [redacted]: 292

COMMERCIAL TRUST COMPANY OF NEW JERSEY, APPELLANT,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED SEPTEMBER 2, 1922.

(29,125)

(29,125)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 575.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, APPELLANT,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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1 *Original Rule to Show Cause.*

In the District Court of the United States for the District of New Jersey.

In Equity.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian In re Certain Stocks, Bonds, Securities, and Money Held by the Respondent as the Money and Property of Helen J. von Schierholz, of Thuringen, Germany, an enemy.

Rule to Show Cause.

On the petition of the Alien Property Custodian of the United States, duly verified and filed herein on the 11th day of September, 1920, and on the motion of the said petitioner;

It is ordered that the said Commercial Trust Company of New Jersey, respondent named herein, do forthwith convey, transfer, assign, deliver and/or pay to Francis P. Garvan, as Alien Property Custodian, all the money and other property described and set forth in the petition annexed hereto, or do appear in this Court,
2 at the place of holding said Court at Newark, on Oct. 4, 1920, on or before the twentieth day after service of this Order, then and there, by answer duly verified to show cause, if any there be, why it should not be required, by order of this Court, so to do, and why the petitioner should not have such other and further relief as in the premises he may be justly entitled to.

It is further ordered that service of this Order be made upon the said Commercial Trust Company of New Jersey by the United States Marshal for the District of New Jersey, by serving upon the President, or any other officer of said corporation, a true and correct copy of this Order, and of the said petition, duly attested by the Clerk of this Court.

Done on this 11th day of September, 1920.

JOSEPH L. BODINE,
U. S. District Judge.

D. H. S./D.
8/26/1920.

(Endorsed:) Filed Sept. 11, 1920, at 11 o'clock A. M. George T. Cranmer, Clerk.

1—575

3 *Original Petition of Custodian.*

In the District Court of the United States for the District of New Jersey.

In Equity.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian In re Certain Stocks, Bonds, Securities, and Money Held by the Respondent as the Money and Property of Helene J. von Schierholz, of Thuringen, Germany, an enemy.

To the Honorable Judges of the District Court of the United States, for the District of New Jersey:

Now comes Francis P. Garvan, as Alien Property Custodian, petitioning this Court, and as grounds for the relief prayed for hereinafter, says:

I.

Your petitioner is the Alien Property Custodian of the United States, duly appointed, qualified and acting under the terms
4 and provisions of the Act of Congress approved October 6, 1917, commonly known as the Trading with the Enemy Act, the amendments thereto, and the proclamations and executive orders issued thereunder. Your petitioner is the successor in office of A. Mitchell Palmer, as Alien Property Custodian, who resigned such official position on March 4, 1919, and who had previously been duly appointed, qualified and acting as such Alien Property Custodian. This proceeding is brought by the said Francis P. Garvan in his official capacity on behalf of the United States of America.

II.

The Commercial Trust Company of New Jersey, respondent herein, is a corporation incorporated under and pursuant to the laws of the State of New Jersey, having its principal place of business at 15 Exchange Place, Jersey City, Hudson County, State of New Jersey.

III.

On or about the 19th day of December, 1917, the Commercial Trust Company of New Jersey, respondent herein, acting under and pursuant to and in compliance with the terms and provisions of the

said Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, and especially in compliance with section 7 (*a*) of said Act, executed a report, under oath, to the Alien Property Custodian said report being signed and sworn to by Jay S. Perkins, Secretary and Treasurer of said
5 corporation, upon A. P. C. form No. 105, that the said corporation held certain stocks, bonds, mortgages, securities and money in trust for the joint account of Frederick Wesche, of Paris, France, and Helene J. Von Schierholz, of Plaue, Thuringen, Germany, to be delivered or paid to the said cestuis que trust upon the demand of either, or of the survivor of them. Said report is on file in the office of the Alien Property Custodian as Report No. 8393, and a copy of the same, containing a complete list of all the money and other property herein referred to is annexed hereto, marked Exhibit "A", and incorporated herein and made a part hereof.

IV.

On or about the 28th day of March, 1919, the said respondent corporation reported to your petitioner as the Alien Property Custodian, by telegraph, that it held for the benefit of the said cestuis que trust the further sums of $39,190.76 designated as a checking account, and $18,159.69 designated as a trust account.

V.

On or about the 19th day of June, 1918, A. Mitchell Palmer, as Alien Property Custodian, predecessor in office to your petitioner, acting under and pursuant to the authority vested in him by the said Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, after investigation, determined that the said Helene J. von Schierholz, of Thuringen, Germany, was an enemy within the purview
6 and meaning of the said Act, and thereafter required the said respondent corporation to forthwith convey, transfer, assign, deliver and/or pay over to him, as Alien Property Custodian, all said money and other property hereinbefore described, together with all interest accrued and collected upon the said money or other property, to be by him held, administered and accounted for according to law. The said demand was served upon the said Commercial Trust Company of New Jersey on or about the 8th day of July, 1918, by the Bankers Trust Company of New York by C. D. Anderson. A copy of the said demand, bearing the return of service endorsed thereon, is annexed hereto, marked Exhibit "B," and incorporated herein and made a part hereof.

VI.

On or about the 28th day of March, 1919, your petitioner, acting under and pursuant to the terms and provisions of the Trading with the Enemy Act, the amendments thereto and the proclamations and

executive orders issued thereunder, further required the said respondent corporation to deliver and pay over to your petitioner, as Alien Property Custodian, the sum of $39,190.76 designated as a checking account, and the sum of $18,159.69 designated as a trust account, both of said sums being held subject to the demand of the said Helene J. von Schierholz, an enemy, and to convey, assign, deliver and pay over to your petitioner certain stocks, bonds, mortgages and securities listed in the said demand, together with all interest and income accrued and collected on any and all of the said money and other property. Service of said demand was
7 made upon the said commercial Trust Company of New Jersey on or about the 17th day of April, 1919, by the Bankers Trust Company of New York, by Chas. E. Flynn. A copy of the said demand, containing a full and complete list of all the money and other property required to be conveyed, assigned, transferred and delivered to your petitioner, and bearing the return of service thereon, is annexed hereto, marked Exhibit "C," and incorporated herein and made a part hereof.

VII.

By virtue of the aforesaid determinations, requirements and demands, made and issued by A. Mitchell Palmer, as Alien Property Custodian, predecessor in office of your petitioner, and by your petitioner as Alien Property Custodian, your petitioner became and now is vested with all the beneficial interests in the said money and other property, and by virtue of the said Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, and the facts herein set forth, your petitioner is the only person entitled to the said money and other property, but the said Commercial Trust Company of New Jersey has failed and refused to recognize the right, power and authority of your petitioner with respect to the said money and other property, and has failed and refused and continues to refuse to convey, transfer, assign, deliver and pay to your petitioner said money and other property, with interest thereon.

VIII.

This is a proceeding brought by your petitioner as Alien Property Custodian of the United States, pursuant to the provisions of
8 Sections 24 of the Judicial Code of the United States, by which the district courts of the United States have original jurisdiction over all suits of a civil nature at common law or at equity brought by the United States or any officer thereof, and under Section 17 of the Act of Congress, approved October 6, 1917, and known as the "Trading with the Enemy Act," by virtue of which, this Court has jurisdiction to make and enter all such orders and decrees and to issue such processes as may be necessary in the premises to enforce the provisions of said Act.

Wherefore Your Petitioner Prays that this Court issue a rule, directed to the said respondent, commanding it, in the alternative, to convey, transfer, assign, deliver and/or pay to your petitioner, as Alien Property Custodian, the said money and other property hereinbefore described, with interest thereon accrued; or else, upon a day and at a place to be named in said writ to show cause, if any there be, why the relief herein prayed should not be granted, and for such other and further relief as in the premises may seem meet and just

[SEAL.] ALIEN PROPERTY CUSTODIAN,
By HENRY E. AHERN,
Managing Director of the Office
of the Alien Property Custodian.

ELMER H. GERAN,
United States Attorney,
Solicitor for Francis P. Garvan,
as Alien Property Custodian,
B. J. W. ACTON,
Assistant U. S. Atty.

9 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me this 9 day of Sept. 1920, H. E. Ahern, who being by me duly sworn, says:

I am the duly appointed, qualified and acting Managing Director at the office of the Alien Property Custodian, and as such, in the absence or disability of Francis P. Garvan, the management and charge of said office are committed to the care of affiant; Francis P. Garvan, who as Alien Property Custodian is the petitioner in this cause, is not within the District of Columbia, nor with the jurisdiction of the District Court of the United States, for the District of New Jersey, and is not within reach of ordinary postal communication without great delay, which would be prejudicial to the interests of the petitioner and of the United States; I have read the foregoing petition and know the facts therein alleged to be true, except those stated to be alleged upon information and belief and as to those I verily believe the same to be true; I have signed the foregoing petition and affixed thereto the seal of the office of the Alien Property Custodian in my official capacity as aforesaid.

H. E. AHERN.

Subscribed and sworn to before me this 9th day of Sept. 1920.
[SEAL.] ODEN B. GRAY,
Notary Public, D. C.

My commission expires Oct. 12, 1920.
D. H. S./D.
8/26/1920.

10 EXHIBIT A.

A. P. C. Form No. 105.

File No. —.

Alien Property Custodian.

Report of Property and Indebtedness Held by Executors, Trustees, or Other Persons Acting in a Like Fiduciary or Representative Capacity under Section 7 (a), "Trading with the Enemy Act."

Notice.

This form is to be used only for the report of executors, administrators, guardians, committees, curators, private trustees, such as trustees under wills, deeds, and settlements, receivers, trustees in bankruptcy, assignees for the benefit of creditors, United States marshals, sheriffs, commissioners, and like officers holding property subject to court order under attachments, distress warrants, replevin or other procedings, and all persons acting under trust agreements or under or pursuant to court order or proceedings, holding property in which an enemy or ally of enemy has or claims any interest.

Penalty.

Failure to make this report to the Alien Property Custodian as provided by law (see extract of act below) is punishable by imprisonment for not more than ten years or fine of not more than ten thousand dollars, or both.

11 The time for the filing of any report which under the act was required to be filed on or before November 5, 1917, has been extended to and including December 5, 1917.

Pursuant to the provisions of section 7(*a*) of the "Trading with the enemy Act," the Alien Property Custodian hereby acquires a written statement under oath containing all the particulars specified in this form.

Instructions.

(1) Read carefully all of this report form and instructions before beginning to make report. Write legibly, using typewriter where possible.

(2) Person.—The word "person" is defined by section 2 of the act as follows:

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

(3) The Person Whose Interest in an Estate or Trust Fund (including indebtedness owed to him by the estate) Must be Reported Herein.—Report must be made of the property or interest in an estate or trust fund held by the person reporting in a fiduciary or representative capacity (other than a mere agency) of, for, or on behalf of (including any indebtedness owed to) any person who by the "Trading with the enemy Act" is defined as an enemy
12 or ally of enemy, or whom the person making this report may have reasonable cause to believe to be an enemy or ally of enemy.

(4) Enemy.—For the purpose of this report, the word "enemy," as defined by section 2 of the act, includes the following:

"(*a*) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(*b*) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof."

Ally of Enemy.—For the purpose of this report, the words "ally of enemy," as defined by section 2 of the act, include the following:

"(*a*) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such
13 territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

"(*b*) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof."

(5) If a person, even an American citizen, is resident within the territory of an enemy or ally of enemy, including that occupied by its military and naval forces, the estate or trust fund in which he has any interest must be reported.

(6) The term "enemy" or "ally of enemy," as used in this form, includes any person whom you may have reasonable cause to believe to be an enemy or ally of enemy.

(7) On October 6, 1917, the United States was at war with Germany; the allies of Germany were Austria-Hungary, Bulgaria, and Turkey.

(8) Who Must Make Reports, and What Must be Reported.—Reports must be made as required by the following paragraph of the act:

"Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any
14 person in the United States who is or shall be indebted in any way to an enemy or ally of enemy or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the alien property custodian by written statement under oath containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February third, nineteen hundred and seventeen."

The Alien Property Custodian, acting under the authority vested in him by the President, including all power and authority to require lists and reports, has issued an order requiring a report of all property so held, and of all debts so owed, on February 3, 1917. If on February 3, 1917, the person reporting held any portion of the estate or trust fund being reported in which the persons, or any of them, named in Division B hereof had an interest, or if on February 3, 1917, the estate or trust being reported was in any way indebted to such persons, or to any of them, an additional report as of February 3, 1917, must be made, unless all such interests and indebtedness are included in this report.

15 (9) Make separate reports on separate blanks for each estate or trust fund in which an enemy or ally of enemy has an interest.

(10) Do not leave any question unanswered. If a negative answer is intended, write "None" or "No."

(11) If two or more persons have joint custody or control of an estate or trust fund, they must report jointly.

To Alien Property Custodian,
Washington, D. C.:

The undersigned, in pursuance of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, hereby

makes the following written statement containing the particulars required by the Alien Property Custodian of the property or interest in an estate or trust fund (including indebtedness owed by the estate to any of the persons named in Division B hereof) which the undersigned on October 6, 1917, held, had, or had custody or control of, or now holds, has or has custody or control of, alone or jointly with others, in which an enemy or ally of enemy, or person whom the undersigned may have reasonable cause to believe to be an enemy or ally of enemy, has an interest, to wit:

16

A.

Person Reporting.

Name of individual, partnership, association, or corporation making report:

Commercial Trust Company of New Jersey, 15 Exchange Place, Jersey City, Hudson County, (Address) (No.) 15 (Street) Exchange Place, (City) Jersey City, (County) Hudson County, (State) New Jersey.

If jointly with others, names and addresses of associates: ——.

B.

Names of Enemies and Allies of Enemy Interested in Estate or Trust Fund.

Name—Helene J. von Schierholz.

Last Known Residence or Address—Schloss Plaue Thuringen, #3 Plaue, Thuringen, Germany.

Nationality—Don't know.

Name and Address of Attorney or Representative in United States (If Any) or Enemy or Ally of Enemy—(Name) E. T. Greiner, (Address) 25 Beaver Street, New York City.

C.

Capacity in Which the Person Reporting Holds the Estate, or Property, or Interest in Property.

State whether person reporting is executor, trustee, or in what fiduciary or representative capacity acting; state when and how appointed; attach copy of will, trust agreement, or other instrument (if any), with statement when and where recorded; in case of decedent's estate, give name of deceased; in case of court proceedings, probate or otherwise, give the title and character of proceed-
17 ing, date when commenced, name of court, and docket number of proceedings; name and address of attorney for estate or trust. Give general statement as to status of the administration of the estate, when last account was filed, and when next account

and final account are likely to be filed, and when estate is likely to be finally settled.

Commercial Trust Company of New Jersey makes this report as trustee under the agreement, a copy of which is hereto annexed and marked "Schedule C." This agreement has not been recorded. The names and addresses of other persons interested with persons names at "B" in the property are as follows:

1. Fr. Wesche, whose last known address is 130 Fauborg Street St. Denis, Paris, France, whose interest is derived from the trust agreement, a copy of which is attached hereto and marked "Schedule C."

SCHEDULE C.

Received, Jersey City, January 30, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particulary set out in the schedule or list hereto annexed, and having a par value of five hundred and twenty four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene
18 J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them. Upon all *all* interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2% of the amount so collected; this receipt is executed in triplicate.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. W. HARDENBERGH,
President.

Attest:
[SEAL.] WM. J. FIELD,
Secretary

The deposit of the bonds with the Commercial Trust Company of New Jersey and the terms upon which said Trust Company is to hold and deliver over the said bonds and to collect and pay over the interest thereon as set forth in the above receipt is hereby ratified and confirmed.

Dated February —, 1913.

FR. WESCHE.
HELENE J. v. SCHIERHOLZ.

(Annexed to the above agreement is a schedule of stocks and bonds which were delivered thereunder, which stocks and bonds are now represented by the schedule annexed to this report.)

19

D.

Nature of Interests of Persons Named at B Hereof in Said Estate or Property.

State whether such persons are sole beneficiaries; if not, give their respective interests and the names and addresses of other persons interested in the estate or trust fund. State how persons named under B hereof are interested, whether as legatees, devisees, creditors or otherwise. If will or other instrument is furnished, indicate part of same relating to the persons named under B hereof, explaining how their interests arise. Give duration of such interests, whether for life, for years, or otherwise. In case of guardianships or life estates or in other cases where relevant, give ages of persons named under B hereof.

So far as Commercial Trust Company of New Jersey knows Helene J. v. Schierholz and Frederick Wesche are sole beneficiaries under said agreement. The property held in trust for Helene J. v. Schierholz and Frederick Wesch is set out in Schedule E hereto annexed.

SCHEDULE E.

	Par.	Rate.	Interest payable.
30,000 Vancouver Lumber Co. Ltd. 1st Mortgage, 6% Bonds, Nos. M-229-237, M239-253, M255-260	30,000	6	Jany. & July 1
9,000 Tacoma Eastern R. R. Co. 1st Mtge. 5% Gold Bonds, Nos. 462-470	9,000	5	"
20			
28,000 City of Chicago, City Hall, 4% Bonds, Nos. 1611-9, 1676-82, 2297-8, 2489-95, 2528-30 ..	28,000	4	"
5,000 Montreal Tramways Co. 1st Refdg. 5% Gold Bonds, Series A, Nos. 4116-20	5,000	5	"
10,000 Gulf & Ship Island R. R. Co. 1st Mtge. Refdg. & Terminal 5% Gold Bonds, Nos. 311-3, 320, 456-8, 780-1, 1817.....	10,000	5	"
10,000 Kings County Lighting Co. 5% Refdg. 1st Mtge. Gold Bonds, Nos. 2131-4, 2137-41, 2354	10,000	5	"
5,000 Board of Education of the Memphis City Schools 4¼% Bonds Nos. 134-6, 267-8.....	5,000	4¼	"

	Par.	Rate.	Interest payable.
11,000 Board of Education of the Memphis City Schools 4½% Bonds, Nos. 232-42	11,000	4½	Jany. & July 1 "
10,000 Adirondack Electric Power Corpn., 1st Mtge. 5% Gold Bonds, Nos. 3949-52, 4156-9, 4216-7	10,000	5	"
5,000 Norfolk Southern R. R. Co. 1st & Refdg. Mtge. 5% Bonds Series A, Nos. M1386-90.....	5,000	5	Feby. & August 1
10,000 Hudson Navigation Co. 6% Gold Mtge. Bonds Nos. 116-8, 605-6, 1143-7	10,000	6	"
21			
40,000 Champion Lumber Co. 1st Mtge. 6% Gold Bonds, Nos. M1012-6, M1218-22, M1427-31, M1632-6, M1837-41, M2044-8, M2250-4, M2457-61	40,000	6	Apr. & Oct. 1
20,000 City of Jersey City Water 4½% Gold Bonds Nos. 2165-74, 2176-85	20,000	4½	"
5,000 Clearview Coal Co., Scranton, Pa., 1st Mtge. 6% Gold Bonds, Nos. 93-7	5,000	6	Apr. & Oct. 15
10,000 New Netherlands Theatre Co. 6% Gen. Mtge. Gold Bonds Nos. 226-235	10,000	6	May & Nov. 1
16,000 The Duluth St. Ry. Co. 5% 1st Mtge. Gold Bonds, Nos. 1-5, 1082-1091, 2069....	16,000	5	"
40,000 Central Georgia Power Co. 1st Mtge. S. F. 5% Gold Bonds, Nos. $500 Bond D2912-31, $1,000 Bond M1927-56.....	40,000	5	May & Nov. 1
6,000 Fonda, Johnstown & Gloversville R. R. Co. 1st Con. Genl. Refdg. Mtge. 4½% Gold Bonds, Nos. 2360-5.....	6,000	4½	"
10,000 City of Los Angeles Water Works, 4½% Bonds Class F, Nos. 9522-6, 11349-53.....	10,000	4½	June & Dec. 1
22			
10,000 Westchester Lighting Co. 1st Mtge. 5% Gold Bonds, Nos. 3411-3, 3769-71, 5811-4..	10,000	5	"

	Par.	Rate.	Interest payable.
5,000 Corporate Stock of the City of New York for the Extension of Riverside Drive, Nos. 25520-4	5,000	3½	May & Nov. 1
5,000 Corporate Stock of the City of New York for the payment of Assessments, Nos. 30008-12	5,000	3½	"
41,000 Corporate Stock of the City of New York, Nos. 2270-2273, 2365-2368, 2375, v2 v2 v2 v2 v2 2398, 2716, 2722, 2724-2726, v2 v2 v2 v2 v2 7700-7714, 7742, 10521- v2 v2 v2 v2 10525 v2	41,000	3½	"
44,000 Corporate Stock of the City of New York to Provide for the Supply of Water, Nos. 655-698	44,000	3½	"
30,000 Corporate Stock of the City of New York, Nos. 80-2, 151-3, 156-7, 10143-52, 10415-18, 10420-7, v3 under all Nos.	30,000	3½	"
10,000 Omaha Water Works of the City of Omaha Nos. 7058, 7025-33	10,000	4½	Jany. & July
53,000 U. S. of American 4% Second Liberty Loan Bonds...	53,000	4	May & Nov. 15

Cash in check account of Helen J. v. Schierholz and Frederick Wesche on deposit with Commercial Trust Company of New Jersey, at its above address, $4,700.08.

E.

Nature of Property Comprising Estate or Trust Fund.

Give a complete list in detail, as of present date, of all property, real, personal, and mixed, including cash on hand, annexing separate sheets if necessary; where reporter is an executor, administrator, or other personal representative of a decedent, include all real estate of which the deceased died seized or possessed, or in which he was in any way interested describe all real estate listed including character

and extent of estate or title to or in same, and whether the property is improved or unimproved, and if improved, character of improvements, estimated market value of the property and encumbrances upon same; if complete list of property belonging to estate or trust fund cannot be given state reason therefor and complete by supplemental report as soon as possible; if inventory or account is a matter of record, state when and where recorded and attach copy thereof, and if not a matter of record, state reason therefor; state actual or estimated annual income from estate or trust, and estimated values of distributable shares of principal and of annual distributable
24 income therefrom of persons named under B; if estate or trust is audited by public accountant, state name and address.

F.

Interests of Unknown Enemies or Allies of Enemy.

If the person reporting has reasonable cause to believe that any interest in the estate is vested in an enemy or ally of enemy, and is not advised of the name of such enemy or ally of enemy, a statement should be made of that fact, together with a statement of the interest of such unknown enemy or ally of enemy in the estate.

Nature and extent of the interest of the unknown enemy or ally of enemy:

.....

Of what country is he (believed to be) a subject or citizen?

.....

Last known residence or address of above enemy or ally of enemy:

.....

Give any further information indicating subsequent change of residence or address.

.....

G.

General Remarks.

(Here include any relevant information not set forth above.)

The following question must also be answered by the person making this report:

25 Did you on February 3, 1917, or on or after October 6, 1917, other than as stated in this report, either individually or in a representative capacity, hold, or have the custody or control of, any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of any enemy or ally of enemy or person whom

ou may have reasonable cause to believe to be an enemy or ally of nemy, and of which you have not yet made report to the Alien roperty Custodian, or were you on February 3, 1917, or on or after ctober 6, 1917, either individually or in a representative capacity, ndebted to such other person, and have not yet made report of such ebt to the Alien Property Custodian?

Answer. No.

(If this question is answered in the affirmative, additional forms ill be furnished upon request.)

[SEAL.] COMMERCIAL TRUST CO. OF N. J.,
(Signature of party making report.)
By J. S. PERKINS,
Secretary and Treasurer.

(Partnership should sign by member or duly authorized representative. Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)

Affidavit of Individual Making Report.

TATE OF ——,
County of ——, *ss:*

I swear (or affirm) that the foregoing report and answers therein ade are true and correct.

—— ——.

Subscribed and sworn to before me this — day of ——, 191-.

—— ——,
—— ——.

idavit of Member or Representative of Partnership Making Report.

ATE OF ——,
County of ——, *ss:*

I swear (or affirm) that I am —— —— of the partnership making foregoing report and that the foregoing report and answers rein made are true and correct.

—— ——.

Subscribed and sworn to before me this — day of ——, 191-.

—— ——,
—— ——.

27 *Affidavit of Officer or Representative of Corporation or Association Making Report.*

STATE OF NEW JERSEY,
County of Hudson, ss:

I swear (or affirm) that I am the Secretary and Treasurer of the corporation making the foregoing report, and that the foregoing report and answer therein made are true and correct.

(Signed) JAY S. PERKINS.

Subscribed and sworn to before me this 19 day of December 1917.

(Signed) —— ANDERSON,
Master in Chancery of New Jersey.

28 Report No. —. Trust No. —.

Do not write on this back, which is to be filled out only in the office of Alien Property Custodian.)

Alien Property Custodian.

Report of Property and Indebtedness Held by Executors, Trustees or Other Persons Acting in a Like Fiduciary or Representative Capacity under Section 7 (*a*), "Trading with the Enemy Act."

—— ——, Reporting Fiduciary.

—— —, 191-. Received and entered in Register of Reports and referred to Director, Bureau of Investigation for report to Bureau of Trusts. —— ——, Report Register Clerk, Accounting Section Division of Accounts.

—— —, 191-. Referred to Director of Bureau of Trusts with action of this Bureau attached. —— ——, Director, Bureau of Investigation.

—— —, 191-. Received and credited to bureau of Investigation in Register of Reports and referred to Division of Court and Private Trusts. —— ——, Director, Bureau of Trusts.

29 —— —, 191-. Referred to Chief of Division of Accounts to open on trust books. —— ——, Chief, Division of Court and Private Trusts.

—— —, 191-. Returned to Chief of Division of Court and Private Trusts. —— ——, Chief, Division of Accounts.

—— —, 191-. Referred to —— Section. —— ——, Chief Division of Court and Private Trusts.

Filed by —— ——.

Date filed ——.

Exhibit B.

A. P. C. Form No. 106. Original. Report No. 8393. Trust No. C-3239.

Alien Property Custodian.

Demand by Alien Property Custodian for Property.

Extracts from "Trading with the Enemy Act."

Sec. 7 (*c*). "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Sec. 7 (*e*). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor or obligee."

To Commercial Trust Company of New Jersey, as Trustee under a certain Trust Agreement between Frederick Wesche, Helene J. von Schierholz, and Commercial Trust Company of New Jersey,

Address, 15 Exchange Place,
Jersey City, N. J.:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act," approved October 6,

1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and said executive orders, after investigation do determine that the following property, to wit:

$38,000.00—Thirty Eight Thousand and no/100 Dollars, Cash together with any interest accrued thereon to date of payment to the Alien Property Custodian.

$30,000.00—Vancouver Lumber Co. Ltd. 1st Mtge. 6% Bonds, Nos. M229, 237, M239-253, M255-260.

$9,000.00—Tacoma Eastern R. R. Co. 1st Mtge. 5% Gold Bonds, Nos. 462-470.

$28,000.00—City of Chicago, City Hall, 4% Bonds, Nos. 1611-9, 1676-82, 2297-8, 2489-95, 2528-30.

$5,000.00—Montreal Tramways Co. 1st & Refdg. 5% Gold Bonds, Series A, Nos. 4116-20.

$10,000.00—Gulf & Ship Island R. R. Co. 1st Mtge. Refdg. & Terminal 5% Gold Bonds, Nos. 311-3, 320, 456-8, 780-1, 1817.

$10,000.00—Kings County Lighting Co. 5% 1st Refdg. Mtge. Gold Bonds, Nos. 2431-4, 2137-41, 2354.

32 $5,000.00—Board of Education of the Memphis City Schools 4½% Bonds, Nos. 134-6, 267-8.

$11,000.00—Board of Education of the Memphis City Schools 4½% Bonds, Nos. 232-42.

$10,000.00—Adirondack Electric Power Corpn., 1st Mtge. 5% Gold Bonds, Nos. 3949-52, 4156-9, 4216-7.

$5,000.00—Norfolk Southern R. R. Co., 1st & Refdg. Mtge. 5% Bonds Series A, Nos. M1386-90.

$10,000.00—Hudson Navigation Co., 6% Gold Mtge. Bonds, Nos. 116-8, 605-6, 1143-7.

$40,000.00—Champion Lumber Co. 1st Mtge. 6% Gold Bonds, Nos. M1012-6, M1218-22, M1427-31, M1632-6, M1837-41, M2044-8, M2250-4, M2457-61.

$20,000.00—City of Jersey City Water 4½% Gold Bonds, Nos. 2165-74, 2176-85.

$5,000.00—Clearview Coal Co., Scranton, Pa. 1st Mtge. 6% Gold Bonds, Nos. 93-7.

$10,000.00—New Netherlands Theatre Co. 6% Gen. Mtge. Gold Bonds Nos. 226-235.

$16,000.00—The Duluth St. Ry. Co. 5% 1st Mtge. Gold Bonds, Nos. 1-5, 1082-1091, 2069.

$40,000.00—Central Georgia Power Co., 1st Mtge. S. F. 5% Gold Bonds, Nos. $500. Bond D2912-31, $1,000 Bond M1927-56.

$6,000.00—Fonda, Johnstown & Gloversville R. R. Co. 1st Con. Genl. Refdg. Mtge. 4½% Gold Bonds, Nos. 2360-5.

$10,000.00—Westchester Lighting Co., 1st Mtge. 5% Gold Bonds, Nos. 3411-3, 3769-71, 5811-4,

$5,000.00—Corporate Stock of the City of New York for the Extension of Riverside Drive, Nos. 25520-4,

33 $5,000.00—Corporate Stock of the City of New York for the payment of Assessments, Nos. 30008-12,

$41,000.00—Corporate Stock of the City of New York, Nos. 2270-

v2

2273, 2365-2368, 2375, 2398, 2716, 2722, 2724-2726, 7700-7714, 7742, 10521-10525,
v2 v2 v2 v2 v2 v2 v2 v2 v2 v2 v2 v2 v2 v2

$44,000.00—Corporate Stock of the City of New York to Provide for the Supply of Water, Nos. 655, 698,
$30,000.00—Corporate Stock of the City of New York, Nos. 80-2, 151-3, 156-7, 10143-52, 10415-18, 10420-7, v3 under all Nos.
$10,000.00—Omaha Water Works of the City of Omaha, Nos. 7058, 7025-33,
$10,000.00—City of Los Angeles Water Works, 4½% Bonds Class F, Nos. 9522-6, 11349-53,
$53,000.00—U. S. of America 4% Liberty Loan Bonds,

together with all interest accrued and collected on any and all of the foregoing to date of payment to the Alien Property Custodian.

The Bankers Trust Co. is hereby designated as depositary, and is authorized to receive for and on behalf of the Alien Property Custodian, the property herein mentioned, and upon the service of this demand on you by said depositary, you are directed to deliver the said property to it forthwith. For money demanded, checks may be delivered to depositary, which in all cases should be made payable to the Alien Property Custodian.

34 is by you owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of Helene J. von Schierholz, Address: Schloss Plaus Thuringen #3 Plaue, Thuringen, Germany, whom after investigation I do determine to be an enemy not holding a license granted by the President, and I hereby require that the said money and property shall be by you conveyed, transferred, assigned, delivered, and paid over to me as Alien Property Custodian to be by me held, administered, and accounted for as provided by law.

Witness my hand and seal of office, this 19th day of June, 1918.

(Signed) A. MITCHELL PALMER,
Alien Property Custodian.

WUV:AAF.

Service of the within demand accepted this 8th day of July, 1918. Served the within notice and demand on the within-named Commercial Tr. Co. of N. J. as trustee under a certain Trust Agreement between Frederick Wesche, Helene J. von Schierholz, & Commercial Tr. Co. of New Jersey, at 15 Exchange Place, in the City of Jersey City, State of New Jersey, this 8th day of July, 1918, by giving a true and correct copy thereof (in the case of a corporation), to Mr. J. S. Perkins, as Asst. Secy. & Treasurer of the corporation of whom

said demand is made, at the office of said corporation. Acceptance of service being refused.

BANKERS TRUST COMPANY,
(Signed) C. D. ANDERSON.

(Strike out the inapplicable clauses.)

35 EXHIBIT C.

Report No. 8393.

Trust No. C3239.

Demand by Alien Property Custodian for Property.

To Commercial Trust Company of New Jersey, as Trustee under a certain Trust Agreement between Frederick Wesche, Helene J. von Schierholz, and Commercial Trust Company of New Jersey,

Address, 15 Exchange Place,
Jersey City, N. J.:

I, Francis P. Garvan, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act," approved October 6, 1917, the amendments thereto, the proclamation of the President, and the Executive Orders issued in pursuance thereof, by virtue of the authority vested in me by said Act as amended, and by said Executive Orders, after investigation do determine that: Helene J. von Schierholz, whose address is Schloss Plaus Thurigen #3 Plaue, Thurigen, Germany, is an enemy (not holding a license granted by the President) and that the following property, right, claim, or chose in action to wit:

That certain obligation, debt or chose in action arising out of, or existing on account of that certain trust agreement made by and between Frederick Wesche and Helene J. von Schierholz with Commercial Trust Company of New Jersey on or about the 30th
36 day of January 1913 and standing on the books of the Commercial Trust Company of New Jersey in the name of and to the credit of Frederick Wesche and Helene J. von Schierholz, said obligation, debt or chose in action being designated as a "Checking Account," now amounting to Thirty Nine Thousand One Hundred Ninety Dollars and Seventy-Six Cents ($39,190.76) together with any accretions thereto and any interest accrued on the said obligation, debt or chose in action, and that certain obligation, debt or chose in action arising out of, or existing on account of that certain trust agreement made by and between Frederick Wesche and Helene J. von Schierholz with Commercial Trust Company of New Jersey on or about the 30th day of January 1913 and standing on the books of the Commercial Trust Company of New Jersey in the name of and to the credit of Frederick Wesche and Helene J. von Schierholz, said obligation, debt or chose in action being designated as a "Trust Account," now amounting to Eighteen Thousand One Hun-

dred Fifty Nine Dollars and Sixty-Nine cents ($18,159.69) together with any accretions thereto and any interest accrued on the said obligation, debt or chose in action, and that the following bonds and corporate stocks, to wit:

$30,000.00—Vancouver Lumber Co. Ltd. 1st Mtge. 6% Bonds, Nos. M229, 237, M239-253, M255-260,

$9,000.00.—Tacoma Eastern R. R. Co. 1st Mtge. 5% Gold Bonds, Nos. 462-470,

37 $28,000.—City of Chicago, City Hall, 4% Bonds, Nos. 1611-9, 1676-82, 2297-8, 2489-95, 2528-30,

$5,000.—Montreal Tramways Co. 1st & Refdg. 5% Gold Bonds, Series A, Nos. 4116-20,

$10,000.—Gulf & Ship Island R. R. Co. 1st Mtge. Refdg. & Terminal 5% Gold Bonds, Nos. 311-3, 320, 456-8, 780-1, 1817,

$10,000.—Kings County Lighting Co. 5% 1st Refdg. Mtge. Gold Bonds, Nos. 2131-4, 2137-41, 2354,

$5,000.—Board of Education of the Memphis City Schools 4¼% Bonds, Nos. 134-6, 367-8,

$11,000.—Board of Education of the Memphis City Schools 4½% Bonds, Nos. 232-42,

$10,000.—Adirondack Electric Power Corpn. 1st Mtge. 5% Gold Bonds, Nos. 3549-52, 4156-9, 4216-7,

$5,000.—Norfolk Southern R. R. Co. 1st & Refdg. Mtge. 5% Bond-Series A, Nos. M1386-90,

$10,000.—Hudson Navigation Co. 6% Gold Mtge. Bonds, Nos. 116-8, 604-6, 1143-7,

$40,000.—Champion Lumber Co. 1st Mtge. 6% Gold Bonds, Nos. M1012-6, M1218-22, M1427-31, M1632-6, M1837-41, M2044-8, M2250-4, M2457-61,

$20,000.—City of Jersey City Water 4½% Gold Bonds Nos. 2165-74, 2176-85,

$5,000.—Clearview Coal Co., Scranton, Pa., 1st Mtge. 6% Gold Bonds, Nos. 93-7,

$10,000.—New Netherlands Theatre Co., 6% Gen. Mtge. Gold Bonds Nos. 226-235,

$16,000.—The Duluth St. Ry. Co. 5% 1st Mtge. Gold Bonds, Nos. 1-5, 1082-1091, 2069,

$40,000.—Central Georgia Power Co. 1st Mtge. S. F. 5% Gold Bonds, Nos. $500, Bond D2912-13, $1,000, Bond M1927-56,

38 $6,000.—Fonda, Johnstown & Gloversville R. R. Co. 1st Con. Genl. Refdg. Mtge. 4½% Gold Bonds, Nos. 2360-5,

$10,000.—Westchester Lighting Co. 1st Mtge. 5% Gold Bonds, Nos. 3411-3, 3769-71, 5811-4,

$5,000.—Corporate Stock of the City of New York for the Extension of Riverside Drive, Nos. 25520-4,

$41,000.—Corporate Stock of the City of New York Nos. 2270, 2273, 2365-2368, 2375, 2398, 2716, 2722, 2724-2726, 7700-7714, 7742, 10521-10525,

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$44,000.—Corporate Stock of the City of New York to Provide for the supply of Water, Nos 655-698,
$30,000.—Corporate Stock of the City of New York, Nos. 80-2, 151-3, 156-7, 10143-52, 10415-18, 10420-7, V3 under all Nos.,
$10,000.—Omaha Water Works of the City of Omaha Nos. 7058, 7025-33,
$10,000.—City of Los Angeles Water Works, 4½% Bonds Class F, Nos. 9522-6, 11349-53,
$53,000.—U. S. of America 4% Second Liberty Loan Bonds, together with all interest and income accrued and collected on any and all of the foregoing to date of payment to the Alien Property Custodian, is by you owing and held for, on account of, on behalf of, and for the benefit of the said enemy.

I, as Alien Property Custodian do hereby seize the above described obligations, debts or choses in action, and I do hereby seize the
39 above described bonds and corporate stocks, and do hereby require that the same shall be by you conveyed, transferred and assigned to me as Alien Property Custodian to be by me held, administered and accounted for as provided by law.

I, as Alien Property Custodian do further require that you note the substance of this seizure and demand upon your books and records with respect to the said obligations, debts or choses in action, and with respect to the above described bonds and corporate stocks.

I, as Alien Property Custodian do further require that you shall forthwith deliver and pay over to me the sum of Thirty Nine Thousand One hundred Ninety Dollars and Seventy Six Cents, ($39,190.76) designated as aforesaid as a "Checking Account," and the further sum of Eighteen Thousand One Hundred Fifty Nine Dollars and Sixty-nine Cents ($18,159.69) designated as aforesaid as a "Trust Account," together with any accretions thereto and any interest accrued on the said sums and the accretions thereto on account of the said obligations, debts or choses in action, to be by me held, administered and accounted for as provided by law.

I, as Alien Property Custodian do further require that you shall forthwith convey, assign, deliver and pay over to me the above described bonds and corporate stocks, together with any interest thereon which has been or may hereafter be received by you, to be by me held, administered, and accounted for as provided by law.

I, as Alien Property Custodian, do hereby further require that within five (5) days from the service of this demand upon you, you shall report to me any and all acts which you have done or
40 omitted to do pursuant to the requirements of this demand.

Witness my hand and seal of office this 28th day of March 1919.

(Signed) FRANCIS P. GARVAN,
Alien Property Custodian.

Approved:

(Signed) C. E. DUNBAR,
Asst. Genl. Couns.

Witness:

(Signed) J. A. LODER.

(Refused acceptance.)

Service of the within demand accepted this — day of ——, 19—.

—— ——.

Served the within notice and demand on the within-named Commercial Trust Co. at 15 Exchange Place, in the City of Jersey, State of New Jersey, this 17 day of April, 1919,

(In the case of an individual)

to the person of whom the said demand is made.

(In the case of a partnership)

to —— ——, a member of the partnership of whom said demand is made.

(In the case of a corporation)

to Jay S. Perkins, Secretary and Treasurer of the Corporation of whom said demand is made, at the office of said corporation.

BANKERS TRUST CO.

(Signed) CHAS. E. FLYNN.

(Strike out the inapplicable clauses.)

(Endorsed:) Filed Sept. 11, 1920 at 11.00 o'clock A. M. George T. Cranmer, Clerk.

41 *Amended Answer of Commercial Trust Company of New Jersey.*

In the District Court of the United States, for the District of New Jersey.

In Equity.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thuringen, Germany, an Enemy.

The amended answer of Commercial Trust Company of New Jersey, above named respondent to the petition of the above named petitioner.

I.

This respondent admits the allegations of paragraph 1 of the petition.

42 II.

This respondent admits the allegations of paragraph 2 of the petition.

III.

This respondent admits that on or about December 19, 1917, this respondent executed a report under oath to the Alien Property Custodian, signed and sworn to as alleged in the petition, to the effect that this respondent held certain stocks, bonds, securities and money in trust for the joint account of Frederick Wesche of Paris, France, and Helene J. von Schierholz of Plaue, Thuringen, Germany, the terms of the said holding being as specified in the agreement depositing the same with this respondent dated January 30, 1913, of which a copy is annexed hereto, and made a part hereof and marked Exhibit (1), except only that said agreement was subsequently modified in April, 1913, by written agreement so as to provide that the compensation of this respondent should be one per cent. on income alone instead of two per cent.

This respondent is without knowledge that said report is on file in the office of the Alien Property Custodian as report #8,393 or that the alleged copy of the same alleged to contain a complete list of the money and other property in this proceeding referred to and annexed to the petition and marked "Exhibit A", is or is not a true copy of said report; and this respondent refers to the original report when produced for the contents of the same.

43 This respondent made the said report for the reasons and upon the information it then had, as hereinafter set out, and for the purpose of protecting itself against liability to the United States of America in the event it should be determined by competent authority upon competent proof that the said Helene J. von Schierholz was in fact an enemy or ally of enemy within the meaning of the "Trading with the Enemy Act".

IV.

This respondent admits that on or about March 28, 1919, this respondent informed the Alien Property Custodian by telegraph that it held for said accounts with Frederick Wesche and Helene J. von Schierholz the amounts of money specified in paragraph 4 of the petition.

Said information was given by this respondent to save itself from liability to the United States of America in the event that it should be thereafter determined by competent authority upon due investigation or hearing, that the said von Schierholz was in fact an alien enemy, or ally of enemy within the meaning of said act, and that such property or any of it was hers or held by, or for her, or on her behalf or account, or for her benefit.

V.

This respondent is without knowledge as to the determination of the status of said Helene J. von Schierholz as an enemy alleged to have been made on or about June 19, 1918, by the Alien Property Custodian.

44 This respondent admits that a demand by the Alien Property Custodian was made upon respondent on or about July 8, 1918, requiring respondent to convey, transfer, assign and deliver to the Alien Property Custodian all money and other property held by this respondent under said deposit agreement of January 30, 1918, together with all interest, accrued and collected thereon.

This respondent is without knowledge as to by whom the said demand was served.

This respondent is without knowledge that the copy of said demand or that the return of service alleged to be endorsed thereon and marked "Exhibit B" are true copies.

This respondent, on information and belief, alleges that A. Mitchell Palmer did not, as Alien Property Custodian, either personally or otherwise, prior to the alleged delivery of the paper "Exhibit B" of the petition herein, or of whatever paper was so delivered, or

at any time, investigate or determine after investigation that the securities and moneys mentioned in said "Exhibit B" of the petition, or any of them, were either owing to or belonging to or held for, by, on account of, or on behalf of or for the benefit of Helene J. von Schierholz in the petition named, and alleges on information and belief that no investigation of the ownership or conditions of tenure thereof, or any of them, aside from receiving such report of this respondent, was made or attempted by said Palmer as such Custodian, or on his behalf; and further alleges on information and belief that the information of the possession by this respondent of such funds and securities specified in said report made by
45 it to the Alien Property Custodian in December, 1917, as to which said "Exhibit B" of the petition recites that such decision was made by said Palmer, as such Alien Property Custodian after investigation, was derived by said Palmer solely from the said reports so made to him by this respondent, and such report itself contained and conveyed to said Palmer as such Alien Property Custodian information and notice that Frederick Wesche was both an owner and a holder at law and interested as a beneficial owner in the securities held and money owed by this respondent described and mentioned in said report, and such report put said Palmer as such Custodian on inquiry as to the ownership of said securities and accounts, and the persons by and for whom and for whose account and benefit the same were held, and required of him investigation of the facts, especially through the sources of which this respondent thereby advised him, and particularly through the said Wesche.

This respondent further alleges on information and belief that neither said Palmer, as such Alien Property Custodian, nor the petitioner herein, his successor, nor any of the respective subordinates, ever made any inquiry of the said Wesche, or of any one representing him, or attempted to make any inquiry of him or of any one representing him, as to the rights of said Wesche or of other persons in such securities or funds or moneys owed, or ever investigated or attempted to investigate the rights of said Wesche, or of others, in such securities or funds or moneys due, or to ascertain any of the facts concerning the beneficial ownership of such
46 securities, funds, and indebtedness, all of which could have been readily ascertained by said Palmer, or by the petitioner, or by their representatives, had they or any of them inquired as to the facts as to ownership and tenure of such property and indebtedness of the said Wesche, whose Paris address had been furnished to said Palmer as such Custodian by this respondent in its said report.

This respondent further alleges on information that any inquires addressed to said Wesche at his Paris address given in the said report to the Custodian made by this respondent, have at all times been regularly forwarded to said Wesche who removed to Switzerland in August, 1914, and said Wesche's Swiss address was at all times after his removal to Switzerland in August, 1914, promptly furnished to any and all inquirers for him at his former Paris address, and all mail addressed to him at that address was forwarded to him

in Switzerland; and that so far as any pretended investigation was made, or any information was secured by said Palmer as such Alien Property Custodian, either personally or officially, prior to the service of the paper of which "Exhibit B" of the petition is alleged to be a copy, such information had disclosed to him, prior to that time, not only that said Wesche was a person to whom said securities legally belonged at least in part, and to whom said sums of money were legally owing and payable by this respondent, and for whose benefit and account and in whose behalf such securities were held;

47 but had also disclosed to such Custodian that said Wesche was at least in part the beneficial owner of said funds and securities and that said Helene J. von Schierholz was at most a beneficial owner of only a part thereof; that disregarding such information and without communication with said Wesche or affording him any opportunity to be heard or to show his rights, and without inquiry or investigation, the said Alien Property Custodian secretly and without evidence to support his pretended conclusion and without making the investigation required by law; and contrary to the information he has in his possession and to the proofs and notice that were before him of the rights of said Wesche, including the report made him by this respondent, and in fraud of the rights of said Wesche (to whom no recourse to any court was then afforded by the terms of the statute, against such Custodian, which then afforded such recourse only to persons resident in the various judicial districts in the United States), and in fraud of the rights of Charles J. Ahrenfeldt, an American citizen then and now resident abroad, either in England, France or Switzerland (to whom no recourse to any court was then afforded by the terms of the statute, because he was not resident in any judicial district of the United States fraudulently pretended that he said Palmer, had duly investigated, and that he had personally examined and passed on the evidence obtained by the investigation of the rights and interests in such securities and moneys owed, when he had not so investigated or examined or passed on the evidence, and that said Palmer

48 fraudulently pretended by his said letter, of which "Exhibit B" of the petition purports to be a copy, to have determined after examination and investigation (contrary to the evidence and information in his possession, and the evidence immediately obtainable had he made investigation, and contrary to the facts as they existed), that said Wesche had no rights in such securities and moneys, and that the same belonged exclusively to said Helene J. von Schierholz.

This respondent further alleges on information and belief that any such pretended determination by the said A. Mitchell Palmer, as Alien Property Custodian, as recited in said "Exhibit B" of the petition herein, that said securities belonged to said Helene J. von Schierholz and that said sums of money were owing to her, was unlawful, fraudulent, null and void and did not constitute due process of law, and was an attempt to deprive the said Wesche and the other owners of said property, of their property without due process of law, and to take their respective private property for public use

without compensation or opportunity to be heard, contrary to the provisions of the Fourth and Fifth amendments to the Constitution of the United States; and that such action was in excess of any powers that the Congress of the United States and the President of the United States could confer on such Custodian, or on any other administrative officer, even when legislating under the war powers of Congress, and also contrary to the provisions of the Act of Congress, approved October 6, 1917, commonly known as the Trading with the Enemy Act, and the amendments thereto
49 theretofore adopted, and contrary to any authority conferred by the President of the United States on said Palmer as such Alien Property Custodian under said Act of October 6, 1917, and the amendments made thereto prior to the making of such pretended determination.

VI.

This respondent admits that on or about March 28, 1919, petitioner made demand upon this respondent requiring respondent to deliver and pay over to petitioner the sums of money in paragraph 6 of the petition.

This respondent denies that said sums were held subject to the demand of said von Schierholz.

This respondent further admits that at the same time petitioner made a demand requiring respondent to convey, assign, deliver and pay over to petitioner certain stocks, bonds and securities, held by respondent under said deposit agreement of January 30, 1913, together with all interest and income, accrued and collected thereon.

This respondent is without knowledge as to by whom the said demand was served or that the alleged copy of the demand annexed to the petition and marked "Exhibit C" or the return of service thereon is a true copy thereof.

Further answering the allegations of paragraph 6 of the said petition herein this respondent, on information and belief, denies that either the sum of $39,190.76 designated as "Checking
50 Account," or the sum of $18,159.69 designated as a "Trust Account," or any part of either thereof was held by the respondent subject to the demand of said Helene J. von Schierholz at any time or times after April 6, 1917, or under any other conditions or in any other way, at any time, than as herein alleged. This respondent, on information and belief, alleges that the right and power of said Helene J. von Schierholz at any time to demand delivery to her of any of said securities or moneys was, from the making of such deposit, only a power in trust, as is more particularly hereinafter set forth, which power ceased and determined on the declaration of war by the United States against Germany on April 6, 1917, and that such power (save for the cash and securities individually belonging to her as hereinafter set forth) involved elements of personal trust and confidence and was not transferable.

This respondent since November 1, 1920, has been informed and on its personal information and belief alleges that Helene J. v

Schierholz in the said petition named was, from and after the declaration of war by the United States on Germany on April 6, 1917, technically an enemy of the United States, and until the enactment of the Act of Congress of June 5, 1920, without a license to deal with said properties, or any thereof, save only such license as was given by general proclamation in 1919. But this respondent alleges, on information and belief, that said Helene J. von Schierholz was born an American citizen on April 14, 1856, in Paris, France,
51 while her parents, who were then and there citizens of the United States, domiciled in Brooklyn, in the State of New York, were temporarily residing in Paris, France; that she is the daughter of the late Charles Ahrenfeldt of Kings County, New York (who was by birth a subject of the King of Denmark, but was duly naturalized as an American citizen on October 3, 1848, and who was domiciled and long resided in the City, as it then was, of Brooklyn, New York, and who retained his domicile in said Brooklyn until his death on January 21, 1893) and of Helene Ahrenfeldt, his wife, who was also an American citizen; that said Helene J. von Schierholz lost her American citizenship and became a German subject by her marriage on or about July 24, 1879 (and long prior to August 1, 1914) to her husband Arthur von Schierholz, who was a German subject, but who died in January, 1899; that at the time of her said marriage said Helene J. von Schierholz was an American citizen; that such marriage occurred long prior to August 1, 1914, and that said Helene J. von Schierholz has been since April 6, 1917, and is still domiciled in Germany and there a resident.

Save and except as hereinafter expressly admitted this respondent has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph numbered "VI" of the petitioner herein, and therefore denies the same, and each and every — thereof.

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VII.

This respondent is without knowledge that by virtue of said alleged determinations, requirements and demands petitioner became or is now vested with any or all the beneficial interests in said money or other property by virtue of Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder and the facts in the petition set forth or otherwise.

This respondent is without knowledge that petitioner is the only person entitled to the said moneys and other property.

This respondent admits that it has failed and refused to recognize the alleged rights, power and authority of petitioner with respect to said moneys and other property and admits that this respondent has failed and refused and continues to refuse to convey, transfer, assign, deliver and pay to the said petitioner said moneys and other property with interest thereon all for the reasons herein set out.

Save and except as in this paragraph specifically admitted this

respondent on information and belief denies each and every allegation contained in paragraph numbered "VII" of the petition herein.

VIII.

This respondent admits the allegations of paragraph VIII.

53 IX.

This respondent alleges on information and belief that the report of December 19, 1917, although made by respondent acting under and pursuant to and in compliance with the terms and provisions of the Trading with the Enemy Act and the amendments thereto, was made among other reasons to save respondent from liability in the event it should be determined by competent authority and upon competent investigation that the said Helene J. von Schierholz was an enemy within the meaning of said act and that the said securities and money were her property or that she was beneficially interested therein, and if so the extent of such interest, and in all respects in conformity with such knowledge and information as this respondent then had. That respondent had no actual knowledge or proof that the said Helene J. von Schierholz was an enemy and respondent's last knowledge at that time as to her residence had been acquired from a letter received from the said Helene J. von Schierholz dated February 15, 1913, and addressed from Schloss Plaue, No. 3, Thuringen, Germany. That respondent, from the receipt of said letter in the month of February, 1913, until November, 1920, had no additional knowledge or proof as to the residence or whereabouts of the said von Schierholz, and such was this respondent's knowledge as to her status on October 6, 1917, the date of the approval of the Trading with the Eenemy Act, and on December 19, 1917, the date of said report. That prior to making the said
54 report, this respondent inquired of one Ernest T. Greiner of the City of New York, who was an agent of Frederick Wesche herein mentioned and held a limited power of attorney from him, as to the residence and whereabouts of the said von Schierholz and was informed by said Greiner that he could not tell this respondent what her actual residence was, whether in or out of territory prohibited by said Act. That this respondent being in doubt as aforesaid as to its duty to file the said report of December 19, 1917, by letter of October 27, 1917, inquired of the Alien Property Custodian whether or not its custody and control of the property and money in question was such as to require this respondent to report the same, and this respondent was advised by the Alien Property Custodian by letter dated October 29, 1917, that in his opinion a report should be filed under Section 7A of the Trading with the Enemy Act, and this respondent filed with said Custodian in December, 1917, its said report in response to such letter from the Custodian.

This respondent further alleges, on information and belief, that Frederick Wesche, above named, was for many years prior to the

death of the late Charles Ahrenfeldt of Brooklyn, New York, a trusted business associate and friend of the said Charles Ahrenfeldt; that said Wesche is a man well over sixty years of age, and that upon the death of said Charles Ahrenfeldt above named in 1893, as above set forth, his three children by his said wife, Helene Ahrenfeldt, namely, Charles J. Ahrenfeldt, Helene J. von Schierholz, above named (née Ahrenfeldt) and Lucy von Uxküll-Gyllenband (née Ahrenfeldt) derived and received from their said father's estate, assets and securities of large value;

That said Charles J. Ahrenfeldt, is, and by and since his birth has at all times been an American citizen; and that said Charles J. Ahrenfeldt has at all times since August 1, 1914, resided and been in either England, or in France, or in Switzerland and has never been an enemy of the United States, or since August 1, 1914, has he at any time resided within any judicial district of the United States.

This respondent further alleges on information and belief that said Lucy von Uxküll-Gyllenband was born a citizen of the United States on April 25, 1861, while her said parents, Charles Ahrenfeldt and Helene Ahrenfeldt, his wife, were domiciled in Brooklyn, but temporarily residing in Paris, France, as above stated; that said Lucy von Uxküll-Gyllenband lost her original American citizenship and became a German subject about 1885 by her marriage to a German subject, one Hans von Wangenheim, from whom she thereafter obtained a valid decree of divorce in the German courts prior to 1897. Thereafter and in 1897 she was again married to Count Woldemar von Uxküll-Gyllenband, also a German subject, and has ever since resided in Germany and is now there a resident in the City of Berlin; and that, at the time of her said first marriage to said von Wangenheim, said Lucy von Uxküll-Gyllenband was an American citizen, and became a German subject by that marriage.

X.

This respondent further alleges, on information and belief, that prior to January 30, 1913, said Charles J. Ahrenfeldt, said Helene J. von Schierholz and said Lucy von Uxküll-Gyllenband, reposing trust and confidence in said Frederick Wesche, had respectively placed in his hands various sums of money and American securities belonging to them respectively in severalty, all derived as aforesaid by them severally from said Charles Ahrenfeldt, deceased, and all situate in this country, to be cared for by said Wesche as the agent of them respectively, with power to said Wesche to make investments and changes in investments thereof from time to time, with the approval of said Charles J. Ahrenfeldt, and with the understanding that said Wesche might likewise, along with such funds, invest other funds of his own, but that while the ownership of such securities and funds should at all times be kept several, the cash at any time on hand might be carried on deposit in the name of said Wesche although belonging to said several parties in their respective proportions.

XI.

This respondent further alleges, on information and belief, which information has been received by it since the first of November, 1920, that in January, 1913 it was agreed among said four parties (namely, said Wesche, said Charles J. Ahrenfeldt, said Helene
57 J. von Schierholz and said Lucy von Uxküll-Gyllenband) that certain securities and some cash then so held by said Wesche belonging to them in severalty, as aforesaid, should be deposited by him with this respondent, and that for convenience, in case of any supervening disability of said Wesche, such cash and securities should be deposited in the joint names of said Wesche and said Helene J. von Schierholz with power (as between themselves and this respondent) to either of them to withdraw the same; but with the definite understanding and agreement among all said four parties that said Helene J. von Schierholz should exercise such power only in case of disability of said Wesche, and then only subject to the like responsibility as he was at all times under, to return to any one of the respective owners, his or her securities and his or her part of the cash upon demand, but leaving with said Wesche power and authority in his own discretion at any time and from time to time to withdraw any and all securities or moneys deposit-d with this respondent.

XII.

This respondent further alleges, on information and belief, which information has been acquired by it since November 1, 1920 that all securities and cash so entrusted to said Wesche by said Helene J. von Schierholz and said Lucy von Uxküll-Gyllenband, respectively, were property derived by them respectively from their said father Charles Ahrenfeldt, deceased, or his estate, or securities into
58 which property so derived by them had been changed by them respectively, and that none of said property so owned by them, or either of them, deposited with this respondent in the joint names of said Wesche and said Helene J. von Schierholz was acquired by either of them, either directly or indirectly from any citizen or subject of Germany or Austro-Hungary, or of any country allied with either of those countries in the said war.

XIII.

This respondent further alleges on information and belief that pursuant to such arrangement between said Wesche, said Charles J. Ahrenfeldt, said Helene J. von Schierholz and Lucy von Uxküll-Gyllenband, the said Wesche and the said Helene J. von Schierholz in January, 1913, and thereafter, entered into a written agreement with this respondent, dated January 30, 1913, a copy of which is annexed hereto and made a part of this answer, marked Exhibit 1, and thereafter, to wit: in May, 1913, by written agreement between

said Wesche and Mrs. von Schierholz and this respondent, said agreement was modified so as to provide that this respondent's commissions should be one per cent on income alone, instead of two per cent, as originally provided, and this respondent further alleges that all securities and monies so held by it involved in this proceeding are monies and securities deposited with it under and pursuant to the terms of said agreement as so modified, all sums of interest and dividends collected by it or credited by it from the said securities and balances of cash on hand in said deposits.

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XIV.

This respondent further alleges that pursuant to such contract between this respondent and said Wesche and von Schierholz, there were deposited with this respondent sundry American securities and cash in 1913, which this respondent alleges, on information and belief, were deposited with it exclusively by said Frederick Wesche, and the same consisted of American securities and cash belonging respectively to said Wesche, and said Charles J. Ahrenfeldt, to said Helene J. von Schierholz and to said Lucy con Uxküll-Gyllenband, all of which had been previously held by said Wesche, part as individual owner of certain thereof and the remainder as the agent respectively of said Charles, of said Helene and of said Lucy, as several owners of such individual sums and securities respectively.

That thereafter certain slight changes in the securities were made and some bonds held in said deposit were paid off, and on December 19, 1917, the cash and securities so deposited with this respondent under said agreement with it as so modified, as hereinbefore alleged, consisted of the securities and monies set out in the alleged copy of this respondent's report of December 19, 1917, annexed to the petition. This respondent further alleges that it was a banking depository of such cash and a bailee of said securities and on information derived by it since October 1, 1920, which this respondent believes, this respondent further alleges that said cash and securities then held by it were held in severalty as follows:

60 1. By said Wesche:

Cash $1,074.23

$10,000 bonds of Vancouver Lumber Co. Ltd.
2,000 " " Kings County Lighting Co.
3,000 " " Adirondack Electric Power Co.
5,000 " " Hudson Navigation Co.
15,000 " " Champion Lumber Co.
5,000 " " New Netherlands Theatre Co.
5,000 " " Duluth Street Railway Co.
24,000 " " Central Georgia Power Co.
6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
9,800 United States bonds of the 2d Liberty Loan

2. By said Charles J. Ahrenfeldt individually:

Cash $303.73

$10,000 bonds of Vancouver Lumber Co., Ltd.
5,000 " " Hudson Navigation Co.
15,000 " " Champion Lumber Co.
5,000 " " New Netherlands Theatre Co.
5,000 " " Central Georgia Power Co.
5,000 " " Omaha Waterworks.
8,000 United States bonds of the 2d Liberty Loan.

3. By said Helene J. von Schierholz:

Cash $1,164.71

$5,000 bonds of Vancouver Lumber Co. Ltd.
7,000 " " Tacoma Eastern R. R. Co.
28,000 " " City of Chicago.
5,000 " " Montreal Tramways Co.

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5,000 " " Gulf & Ship Island Railway.
5,000 " " Kings County Lighting Co.
5,000 " " City of Memphis bearing 4¼% interest.
7,000 " " Adirondack Electric Power Co.
5,000 " " Norfolk Southern R. R. Co.
5,000 " " Champion Lumber Co.
10,000 " " Jersey City (Water).
2,000 " " Clearview Coal Co.
5,000 " " Duluth Street Railway Co.
5,000 " " Central Georgia Power Co.
5,000 " " Westchester Lighting Co.
42,000 Stock of the City of New York.
16,500 United States bonds of the 2d Liberty Loan.

4. By said Lucy von Uxküll-Gyllenband individually:

Cash $2,157.41

$5,000 bonds of Vancouver Lumber Co. Ltd.
2,000 " " Tacoma Eastern R. R. Co.
5,000 " " Gulf & Ship Island R. R. Co.
3,000 " " Kings County Lighting Co.
11,000 " " City of Memphis bearing 4½% interest.
5,000 " " Champion Lumber Co.
10,000 " " Jersey City (Water).
3,000 " " Clearview Coal Co.
6,000 " " Duluth Street Railway Co.
6,000 " " Central Georgia Power Co.
10,000 " " Los Angeles Water Works.
5,000 " " Westchester Lighting Co.

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83,000 stock of the City of New York.
5,000 bonds of Omaha Water Works.
18,700 United States bonds of the 2d Liberty Loan.

That all said securities had been owned in severalty by the said several individuals as above set forth from a time prior to March 1st, 1914, save and except that:

1. Each of the said lots of Liberty Bonds had been bought with cash on hand then on deposit in said "Checking" account with this respondent, belonging to the individual so acquiring such bonds, on the 6th day of October, 1917.

2. Said Helene J. von Schierholz had acquired $2,000 of her Kings County Lighting Co. bonds, $5,000 of her Adirondack Electric Power Company bonds and her $2,000 Clearview Coal Company bonds on or about March 7th, 1914, and prior to August 1st, 1914, by purchase from said Charles J. Ahrenfeldt for cash belonging to her.

3. Said Lucy von Uxküll-Gyllenband had acquired her $3,000 Kings County Lighting Co. bonds, her $3,000 Clearview Coal Company bonds and her $6,000 Duluth Street Railway Co. bonds on or about March 6, 1914 and prior to August 1st, 1914 by purchase from said Charles J. Ahrenfeldt, for cash belonging to her.

XV.

This respondent further alleges that by sales, changes, additions, withdrawals, maturities and accruals of income, the said se-
63 curities and monies since the making of said report of December 19, 1917, have been changed; annexed hereto and marked Exhibit 2 and made a part of this answer, is a list of the monies and securities in respondent's possession on October 1, 1920, held under said agreement of January 30, 1913, and said modification thereof, which list and amount has changed since that date only as additional coupons have been collected on the securities so held and the proceeds deposited to the credit of said trust accounts; and for earned additional interest from time to time on the said accounts.

XVI.

This respondent further alleges, on information and belief, that on October 1, 1920, the sums credited to said Trust Account, so held by this respondent above all commissions charged thereon pursuant to said agreement, amounted to the aggregate sum of $61,583.83, which sum belonged to the said Wesche, Ahrenfeldt, von Schierholz and von Uxküll-Gyllenband, respectively, and in severalty as follows:

To said Wesche	$12,924.99
To said Charles J. Ahrenfeldt, individually	8,862.16
To Helene J. von Schierholz, individually	19,063.99
To Lucy von Uxküll-Gyllenband, individually	20,732.69

64 and that on October 1, 1920, the balance to the credit of said Checking Account was $40,996.81, which sum belonged to

To said Wesche individually	$12,438.46
To said Charles J. Ahrenfeldt, individually	11,624.45
To said Helene J. von Schierholz, individually	8,345.31
To said Lucy von Uxküll-Gyllenband, individually	8,588.59

XVII.

This respondent further alleges, on information and belief, that of the sums so held on said Trust Account on October 1, 1920, all derived from the securities so held by this respondent, the following were the sources and the holdings, namely:

1. Sums belonging to said Wesche individually:

Principal of $5,000 New Netherlands Theatre bonds paid off belonging individually to said Wesche	$5,000.00
Amounts of interest or coupons collected on the individual securities above described belonging to said Wesche individually so deposited with this respondent (less commissions of 1%)	7,526.77
Amounts of interest credited growing out of the above amounts credited to said Trust account belonging to said Wesche individually (less commissions of 1%)	398.22
	$12,924.99

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2. Sums belonging to Charles J. Ahrenfeldt individually:

Principal of $5,000 New Netherlands Theatre bonds paid off belonging individually to said Charles J. Ahrenfeldt	$5,000.00
Amounts of interest or coupons collected on the individual securities above described belonging to said Charles J. Ahrenfeldt individually, so deposited with this respondent (less commissions of 1%)	3,639.53
Amounts of interest credited growing out of the above amounts credited to said Trust account belonging to said Charles J. Ahrenfeldt individually (less commissions of 1%)	222.63
	$8,862.16

3. Sums belonging to Helene J. von Schierholz individually:

Principal of $2,000 Clearview Coal Company bonds paid off belonging individually to said Helene J. von Schierholz	2,000.00
66 Amounts of interest or coupons collected on the individual securities above described belonging to said Helene J. von Schierholz individually, so deposited with this respondent (less commissions of 1%)	16,338.35
Amounts of interest credited growing out of the above amounts credited to said account belonging to said Helene J. Schierholz individually (less 1% commissions)	725.64
	$19,063.99

4. Sums belonging to Lucy von Uxküll-Gyllenband individually:

Principal of $3,000 Clearview Coal Company Bonds paid off belonging individually to said Lucy von Uxküll-Gyllenband on deposit with this respondent in January 1918	$3,000.00
Amounts of interest or coupons collected on the individual securities above-described belonging to said Lucy von Uxküll-Gyllenband individually, so deposited with this respondent (less commissions of 1%)	16,946.86
Amounts of interest credited to such Trust Account accruing on the above amounts credited to said 67 account belonging to said Lucy von Uxküll-Gyllenband individually (less commissions of 1%)	785.83
	$20,732.69

XVIII.

This respondent further alleges, on information and belief that in addition to the said sums so held on October 1, 1920, additional coupons are from time to time collected belonging to said four several individuals, cut from their said respective securities, which belong to them respectively, in severalty, and additional interest is being earned on their several balances deposited in the said account, all of which belong to their respective interests therein.

XIX.

This respondent further alleges, on information and belief, that the securities still in the hands of this respondent so deposited with it now consist of the following securities owned, as this respondent is informed and believes, severally by the following individuals respectively:

1. Securities owned by said Wesche individually:

$2,000 bonds of Kings County Lighting Company.
3,000 " " Adirondack Electric Power Company.

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5,000 " " Hudson Navigation Company.
15,000 " " Suncrest Lumber Company.
5,000 " " Duluth Street Railway.
24,000 " " Central Georgia Power Company.
6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
9,800 United States bonds (2d Liberty Loan).

2. Securities owned by said Charles J. Ahrenfeldt individually:

$5,000 bonds of Hudson Navigation Company.
15,000 " " Suncrest Lumber Company.
5,000 " " Central Georgia Power Company.
5,000 " " Omaha (Water Works).
8,000 United States bonds (2d Liberty Loan).

3. Securities owned by said Helene J. von Schierholz individually:

$7,000 bonds of Tacoma Eastern R. R. Co.
28,000 " " City of Chicago (City Hall 4s).
5,000 " " Montreal Tramways.
5,000 " " Gulf & Ship Island Ry. Co.
5,000 " " Kings County Lighting Co.
5,000 " " the City of Memphis (4¼%).
7,000 " " " Adirondack Electric Power Company.
5,000 " " the Norfolk Southern R. R. Co.
5,000 " " Suncrest Lumber Company.

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10,000 " " Jersey City, Water Works.
5,000 " " The Duluth Street Railway.
5,000 " " " Georgia Central Power Co.
5,000 " " " Westchester Lighting Company.
42,000 stock of the City of New York.
16,500 United States bonds (2d Liberty Loan).

4. Securities owned by said Lucy von Uxküll-Gyllenband individually.

$2,000 bonds of Tacoma Eastern R. R. Co.
5,000 " " Gulf & Ship Island Ry.
3,000 " " Kings County Lighting Co.
11,000 " " the City of Memphis (4½%).
5,000 " " Suncrest Lumber Company.
10,000 " " Jersey City—Water Works.
6,000 " " Duluth Street Railway.
6,000 " " Central Georgia Power Co.
10,000 " " City of Los Angeles (Water Works).
5,000 " " Westchester Lighting Company.
83,000 stock of the City of New York.
5,000 Bonds of Omaha (Water Works).
18,700 United States bonds (2d Liberty Loan).

That such securities so owned are in each instance accompanied by all coupons thereto belonging maturing since October 1st, 1920 (save as any such coupons have been collected since October 1st, 1920, and thereafter credited to said Trust Account) and the
70 coupons and any proceeds so collected and any interest accruing thereon are the several property of said several owners of the securities to which they pertain. All the said several securities herein mentioned other than the said United States bonds are securities issued by various American private or municipal corporations.

XX.

This respondent further alleges, on information, that the above named securities and the above described indebtedness and sums of cash so set apart, all of which are so claimed by said Frederick Wesche, by said Charles J. Ahrenfeldt, by said Helene J. von Schierholz and by said Lucy von Uxküll-Gyllenband respectively, are the identical securities, indebtedness, and particular funds of cash which the Alien Property Custodian, as petitioner herein, is asking to have directed turned over to him by order and decree of this Court upon his petition herein.

XXI.

This respondent further alleges, on information and belief, that Frederick Wesche, above named, is a resident of Territet, in the Canton of Vaud, in the Republic of Switzerland, where his address is Villa Supplitt, and that ever since the first week in August, 1914, he has been resident and domiciled in the Republic of Switzerland, first in Lucerne, Switzerland, up to January, 1920, and since
71 then in said Territet, and that he has during all said period had, and now has, his domicile in said Switzerland. That up to the time of taking up his residence and domicile in Switzerland, as aforesaid, said Wesche for more than thirty years had continuously resided and been domiciled in Paris, France; and that for more

than thirty-five years last past said Wesche has not at any time been domiciled in or resident in either Germany, or any part thereof, or in any country which was an ally of Germany in the war which broke out between Germany and France and other countries in August, 1914, and into which the United States entered in April, 1917, nor has said Wesche during any part of such period and particularly long since July 1, 1914, been doing business in Germany or Austro-Hungary, or in any country which was an ally of Germany or Austro-Hungary in such war, and that he is not doing business in any such place now, nor as this respondent is informed and believes, has said Wesche at any time for more than forty years past and particularly since January 1, 1914, been an officer, official or agent of the Government of Germany, or of that of Austro-Hungary, or of any government of any nation with which the United States is now, or has since January 1, 1900, at any time been at war, or of any nation allied either with Germany or Austro-Hungary in such war, or of any political or municipal subdivision of either Germany or Austro-Hungary, or of any such government or nation, and that said Wesche is not and never has been an enemy of
72 the United States nor has he been within the United States at any time since 1913 or resident in any judicial district of United States.

XXII.

This respondent further alleges, on information acquired by it since November 1, 1920, and on belief therein, that said Wesche was at all times since 1900 and still is the agent of said Charles J. Ahrenfeldt, of said Helene J. von Schierholz and of said Lucy von Uxküll-Gyllenband, in charge of their said respective securities and monies, and holder of his own, and that this relation was not changed by the arrangement for deposit of said securities and cash in the joint names of said Wesche and said Helene J. von Schierholz with this respondent any further than this: that she should be able to act as alternate for said Wesche in withdrawing such securities and cash in event of the death or other disability of said Wesche and that it was a term of the arrangement between the said Wesche, Ahrenfeldt, von Schierholz and von Uxküll-Gyllenband for such deposit with this respondent in the joint names of said Wesche and said Helene J. von Schierholz, that she should act only as such alternate in such event and that she was given such power by the others only upon that trust. This respondent further alleges that said Helene J. von Schierholz has not at any time from the inception of such deposit in January, 1913, interfered in any way with the deposit of securities and
73 cash made with this respondent, but at all times this respondent has received all orders and instructions and directions concerning such deposit solely from the said Frederick Wesche or his authorized representatives.

This respondent further alleges, on information and belief, that the application of the petitioner herein to seize all such funds and securities under the power conferred upon said Helene J. von Schier-

holz by the making of the deposit in the joint names of said Wesche and herself pursuant to the said agreement of January, 1913, is contrary to the terms of the arrangement and trust under which she was made a co-depositor, and under which such deposits with this respondent were made by the said Wesche, namely, that she should act only as such alternate, and only in the event of the death or disability of said Wesche, and that such attempt is in breach of the trust duties and relations imposed on her by such arrangement, to all of which the petitioner herein would, if he could have taken over her said power, have ipso facto been subject; that said Wesche has not at any time been under any disability to act, and neither the time nor the occasion when said Helene J. von Schierholz would be justified in withdrawing any of said cash or securities by virtue of the deposit in the joint names of said Wesche and herself under said agreement of January, 1913, as modified, has ever arisen; and that the attempt of the Custodian
74 to obtain such funds and securities by virtue of her being so named as joint depositor, and by virtue of the provisions of the agreement with this respondent hereto annexed if he had the power to exercise the power held by said Helene J. von Schierholz was a breach of the trust duties assumed by her (upon the assumption of which alone she was named as such joint depositor on the terms stated in such contract with this respondent), and in fraud of the rights of the other real owners of said property.

XXIV.

This respondent further alleges that said Wesche by his attorney in fact, Selden Bacon, of the City of New York, prior to the institution of these proceedings and in July, 1920, demanded of the respondent that it pay over and deliver to said Wesche, or to his said attorney in fact, the securities and monies above mentioned.

XXVI.

This respondent further alleges that one Ernest T. Greiner, residing in the City of New York, prior to the institution of these proceedings, notified this respondent that he claims a lien on all the funds and securities on deposit with respondent, standing in the names of said Frederick Wesche and Helene J. von Schierholz under the said deposit agreement annexed hereto, and on all interest or increment due or becoming due thereon and has demanded
75 of respondent that none of said property be transferred or otherwise disposed of until further notice from him.

That said Greiner was attorney in fact for the said Wesche from the year 1913 to May 18, 1920, acting for the said Wesche in connection with the monies and securities above mentioned so deposited with this respondent and held by it as aforesaid. This respondent does not know on what basis the said Greiner claims such lien and has been notified by the said Wesche and said Ahrenfeldt, by Selden Bacon, their attorney in fact, not to deliver any of said

monies or securities to the said Greiner, and that said Greiner has no rights in or to the same.

XXVI.

This respondent is informed by the said Wesche and the said Ahrenfeldt, by Selden Bacon, their attorney in fact, and by the said Greiner, that they respectively are desirous of intervening in this proceeding and of setting up and establishing their rights to the monies and securities above mentioned. That this respondent while so informed by said Wesche and said Ahrenfeldt, through their said attorney Selden Bacon, of the nature of the holdings of the said Wesche, has no knowledge thereof, and is entirely ignorant of the nature of the claims of said Greiner, or of any basis therefor.

XXVII.

This respondent further alleges, on information and belief, that had said A. Mitchell Palmer, or the petitioner, his successor,
76 as Alien Property Custodian, or their or either of their representatives at any time either in 1918, 1919, 1920 or 1921, made due inquiry or investigation into the rights to the said funds and securities so deposited with this respondent and to the sums so on deposit with it, or into the ownership or tenure thereof, the foregoing matters would have been promptly and fully disclosed to them; that none of them made any investigation whatever into the ownership or tenure or conditions thereof beyond obtaining the said report of December, 1917, from this respondent.

This respondent further alleges on information and belief that no investigation and no determination after investigation of the ownership or holding of the securities and monies in the hands of this respondent hereinbefore described, such as was contemplated by the provisions of the Trading with the Enemy Act has ever been made either by the former Alien Property Custodian, or by the present Alien Property Custodian, the petitioner herein, or by any representative of either, and this respondent calls attention to the fact that the petitioner in his petition herein, while carefully alleging that the said A. Mitchell Palmer as Alien Property Custodian did investigate and after investigation determine that said Helene J. von Scheirholz was in 1918 an enemy of the United States, has equally carefully avoided making any allegation that either said Palmer as such Alien Property Custodian, or the said petitioner himself, his successor or the subordinates of either of them,
77 have either investigated or determined after investigation that the indebtedness of this respondent and the property mentioned in its possession belonged to or was owing to or was by this respondent held for, by, on account of, or for the benefit of said Helene J. von Schierholz.

XXVIII.

This respondent further alleges that the claims of said Wesche and said Ahrenfeldt, and said Wesche claims the right to the possession of all of the said property as partial owner thereof and as agent of the other owners, have been asserted to it without any collusion on the part of this respondent, and that for its due protection, all of the said claimants except Greiner being non-residents of the United States, it is essential that they and each of them be cited into this proceeding for the determination of their rights thereto.

Wherefore this respondent prays:

1. That the said Wesche, the said Ahrenfeldt and the said Greiner be each of them joined as defendants in this proceeding and cited into it and required to set up their respective rights in and to the said monies and securities for the determination of the same by this court, or in lieu thereof, be permitted to intervene therein voluntarily.

2. That it be determined by this court what, if any, por-
78 tion of the said property belongs to each of the several persons alleged to have been interested therein, namely, said Wesche, said Charles J. Ahrenfeldt, said Helene J. von Schierholz, said Lucy von Uxküll-Gyllenband and said Ernest T. Greiner, and that the status and rights of each be determined pursuant to law. That respondent's commissions be ascertained and determined and the respondent be ordered to pay to itself its commissions and a counsel fee to be fixed by this court, and that respondent be ordered to convey, transfer, assign, deliver and pay over the balance of the monies and securities to persons entitled thereto; that each and all the other parties to the proceedings be enjoined from asserting any and all further claims against this respondent for the property when so turned over, and be enjoined from molesting or annoying this respondent with respect thereto, and that this respondent have such other and further relief as may be just in the premises and agreeable to equity.

FISK & FISK,
Solicitors for Respondent,
Commercial Trust Company of New Jersey.

Office and Post Office Address, 15 Exchange Place, Jersey City, N. J.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
Per J. V. PERKINS,
Vice-President.

Attest:

R. S. CARMICHAEL,
[Corporate Seal.] *Secretary.*

79 STATE OF NEW JERSEY,
County of Hudson, ss:

R. S. Carmichael, being duly sworn, according to law on his oath deposes and says that he is secretary and treasurer of the Commercial Trust Company of New Jersey, the respondent in the above suit; that to the best of his knowledge, information and belief the matters contained in the foregoing answer of Commercial Trust Company of New Jersey, so far as concerns the acts and deeds of said Company are true, and that therein relates to the acts or deeds of any other person deponent believes it to be true.

Deponent further says that the seal on the foregoing answer is the seal of the Commercial Trust Company of New Jersey; that the same was affixed thereto by authority of its Board of Directors and that the said answer was signed by the President of said Commercial Trust Company of New Jersey and by this deponent by like authority.

R. S. CARMICHAEL.

Subscribed and sworn to before me this 21st day of February, 1921.

SAMUEL TARTALSKY,
Attorney at Law of New Jersey.

80 EXHIBIT 1.

Received, Jersey City, January 30, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed, and having a par value of five hundred and twenty-four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2% of the amount so collected; *h*is receipt is executed in triplicate.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. W. HARDENBERGH,
President.

Attest:
WM. J. FIELD,
[SEAL.] *Secretary.*

81 The deposit of the bonds with the Commercial Trust Company of New Jersey and the terms upon which said Trust Company is to hold and deliver over the said bonds and to collect and pay over the interest thereon as set forth in the above receipt is hereby ratified and confirmed.

Dated, February —, 1913.

FR. WESCHE.
HELENE J. v. SCHIERHOLZ.

$5,000 Corporate Stock of the City of New York, 4½%, due September 1, 1960, #11299 V13 to 11303 V13 inclusive.

$5,000 Corporate Stock of the City of New York, 3½%, due May 1, 1954, #30008 to 30012 inclusive. For the payment of assessments, etc.

$30,000 Corporate Stock of the City of New York, 3½%, due November 1, 1955, #80 V3 to 82 V3, 151 V3 to 153 V3, #156, 157 V3, 10143 to 10152 V3, 10415 to 10418 V3 #10420 to 10427 V3 inclusive.

$41,000 Corporate Stock of the City of New York, 3½%, due November 1, 1954 #2270 V2 to 2273 V2, 2365 V2 to 2368 V2, 2375 V2, 7700 to 7714 V2, 7742 #10521 to 10525 V2.

$44,000 Corporate Stock of the City of New York, 3½% due November 1, 1954, #655 W to 698 W inclusive. To pro-
82 vide for the supply of water.

$5,000 Corporate Stock of the City of New York, 3½%, due May 1, 1954, #25520 to 25524 inclusive, for the extension of Riverside Drive to Boulevard Lafayette.

$10,000 New Netherlands Theatre Company, 6%, due May 1, 1920, #226 to 235 inclusive.

$9,000 Tacoma Eastern Railroad Company, First Mortgage, 5%, due January 1, 1923, #462 to 470 inclusive.

$5,000 City of Los Angeles, 4½%, due December 1, 1925, #9522 to 9526 inclusive.

$5,000 City of Los Angeles, 4½%, due December 1, 1933, #11349 to 11353 inclusive.

$5,000 Long Island City $500 bonds, 4½%, Series 2, due April 1, 1914, #B91 to B100 inclusive.

$10,000 Richmond & Danville Railroad Company Consolidated Mortgage, 6% due January 1, 1915, #4211, 5866 to 5874 inclusive.

$6,000 Fonda, Johnstown & Gloversville First Consolidated General Refunding 4½%, due 1952, #2360 to 2365 inclusive.

$3,000 Chicago, Rock Island & Pacific, First Refunding 4%, due April 1, 1934, #10140, 10141, 55267.

$20,000 City of Jersey City, Water 4½%, due October 1, 1961, #2165, to 2174, 2176 to 2185 inclusive.

$10,000 Peoples Coal Company, First Mortgage, 6%, due October 15, 1918, #251 to 260 inclusive.

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$20,000 Peoples Coal Company, First Mortgage, 6%, due April 15, 1919, #261 to 280 inclusive.

$40,000 Central Georgia Power Company, First Mortgage 5%, due May 1, 1938, #M1943 to 1956 inclusive, M1927 to M1942 inclusive, $1,000 bonds; $500 bonds, D2912 to 2931 inclusive.

$15,000 Westchester Lighting Company, first mortgage 5%, Due 1950, 1905, 1906, 2387, 3277, 3411, 3412, 3413, 3769, 3770, 3771, 2388, 3811 to 3814 inclusive.

$12,000 Norfolk Southern Railroad Company, First Refunding, Series A, 5%, due February 1, 1961, #M1381 to M1390, M5753, 5754.

$2,000 Baltimore & Ohio First 4s, due July 1, 1948, M5906, M28384.

$40,000 Champion Lumber Company, First Mortgage, 6%, due October 1919—M1012 to M1016 inclusive, due October 1920—M1218 to M1222 inclusive, due October 1921—M1427 to M1431 inclusive, due October 1922—M1632 to M1636 inclusive, due October 1923—M1837 to M1841 inclusive, due October 1924—M2044 to M2048 inclusive, due October 1925—M2250 to M2254 inclusive, due October 1926—M2457 to M2461 inclusive.

$16,000 Board of Education of the Memphis City Schools, Tenn. 4¼%, due July 1, 1959, #134, 135, 136, 231, 267, 397,
84 399, 405 to 412, 414, 415, 268.

$11,000 Board of Education of the Memphis City Schools, Tenn. 4½%, due July 1, 1961, #232 to 242 inclusive.

$30,000 Vancouver Lumber Company, Limited, First Mortgage Gold, due January 1, 1918, 6%, #229 to 237, 239 to 253, 255 to 260 inclusive.

$20,000 Duluth Street Railway Company, First Mortgage 5%, due May 1, 1930, #1082 to 1093, 2067 to 2069, #1, 2, 3, 4, 5.

$28,000 City of Chicago, City Hall bonds, 4%, due January 1, 1923, #1611 to 1619, 1676 to 1682 inclusive; due January 1, 1925, #2297, 2298; due January 1, 1926, #2489 to 2495, 2528 to 2530 inclusive.

$10,000 Kings County Lighting Company, First Refunding, 5%, due July 1, 1954, #2131 to 2134, 2137 to 2141, 2354.

$10,000 Hudson Navigation Company 6%, due February 1, 1938, #116 to 118, 605, 606, 1143 to 1147 inclusive.

$10,000 Adirondack Electric Power Corporation, First Mortgage 5%, due January 1, 1962, #3949 to 3952, #4156 to 4159, 4216, 4217.

$10,000 City of Seattle, Funding, 5%, due July 1, 1913, #425 to 429, 489 to 493 inclusive.

$10,000 State of Tennessee, Settlement, 3%, due July 1, 1913, #7447 to 7453, 11586 to 11590 inclusive.

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$10,000 Gulf & Ship Island Railroad Company, First Mortgage Refunding, Terminal, 5%, due February 1, 1952, #311 to 313, 320, 456 to 458, 780, 781, 1817.

$10,000 Montreal Tramways Company, First Refunding 5%, due July 1, 1941, M4111 to M4120 inclusive.

$5,000 Clearview Coal Company, Scranton, Pa., First Mortgage, 6%, due April 15, 1919, #93 to 97 inclusive.

Current coupons attached to all of the above bonds, except coupons due February 1, 1913.

Exhibit 2.

List of Securities Held by Commercial Trust Company of New Jersey October 14th, 1920, for Account of Frederick Wesche and Helene J. Von Schierholz under Deposit Agreement Dated January 30th, 1913, as of October 15, 1920.

	Par.	Rate.	Interest payable.
$9,000 Tacoma Eastern R. R. Co. 1st Mtge. 5% Gold Bonds, Nos. 462-470	9,000	5	Jan'y & July 1.
28,000 City of Chicago, City Hall, 4% Bonds, Nos. 1611-9, 1676-82, 2297-8, 2489-95, 2528-30	28,000	4	"

86

5,000 Montreaal Tramways Co. 1st Refdg. 5% Gold Bonds, Series A, Nos. 4116-20	5,000	5	"
10,000 Gulf & Ship Island R. R. Co. 1st Mtge. Rfdg. & Terminal 5% Gold Bonds, Nos. 311-3, 320, 456-8, 780-1, 1817	10,000	5	"
10,000 Kings County Lighting Co. 5% Refdg. 1st Mtge. Gold Bonds, Nos. 2131-4, 2137-41, 2354	10,000	5	"
5,000 Board of Education of the Memphis City Schools 4¼% Bonds Nos. 134-6, 267-8	5,000	4¼	"
11,000 Board of Education of the Memphis City Schools 4½% Bonds, Nos. 232-42	11,000	4½	"
10,000 Adriondack Electric Power Corpn., 1st Mtge. 5% Gold Bonds, Nos. 3949-52, 4156-9, 4216-7	10,000	5	"

	Par.	Rate.	Interest payable.
5,000 Norfolk Southern R. R. Co. 1st & Refdg. Mtge. 5% Bonds Series A, Nos. M1386-90.....	5,000	5	Feby. & August 1.
10,000 Hudson Navigation Co. 6% Gold Mtge. Bonds Nos. 116-8, 605-6, 1143-7.....	10,000	6	"
87			
20,000 City of Jersey City Water 4½% Gold Bonds Nos. 2165-74, 2176-85	20,000	4½	Apr. & Oct. 1.
16,000 The Duluth St. Ry. Co. 5% 1st Mtge. Gold Bonds, Nos. 1-5, 1082-1091, 2069	16,000	5	May & Nov. 1.
40,000 Central Georgia Power Co. 1st Mtge. S. F. 5% Gold Bonds, Nos. $500 Bond D2912-31, $1,000 Bond M1927-56.....	40,000	5	May & Nov. 1.
6,000 Fonda, Johnstown & Gloversville R. R. Co. 1st Con. Genl. Refdg. Mtge. 4½% Gold Bonds Nos. 2360-5.....	6,000	4½	"
10,000 City of Los Angeles Water Works, 4½% Bonds Class F, Nos. 9522-6, 11349-53.....	10,000	4½	June & Dec. 1.
10,000 Westchester Lighting Co. 1st Mtge. 5% Gold Bonds, Nos. 3411-3, 3769-71, 5811-4.....	10,000	5	"
5,000 Corporate Stock of the City of New York for the Extension of Riverside Drive, Nos. 25520-4	5,000	3½	May & Nov. 1.
5,000 Corporate Stock of the City of New York for the payment of Assessments, Nos. 30008-12...	5,000	3½	"
88			
41,000 Corporate Stock of the City of New York, Nos. 2270-2273, v2 v2 2365-2368, 2375, 2398, 2716, v2 v2 v2 v2 v2 2722, 2724-2726, 7700-7714, v2 v2 v2 v2 v2 7742, 10521-10525 ..... v2 v2 v2	41,000	3½	"
44,000 Corporate Stock of the City of New York to Provide for the Supply of Water, Nos. 655-698.	44,000	3½	"

	Par.	Rate.	Interest payable.
30,000 Corporate Stock of the City of New York, 80-2, 151-3, 156-7, 10143-52, 10415-18, 10420-7, v3 under all Nos.	30,000	3½	May & Nov. 1.
10,000 Omaha Water Works of the City of Omaha Nos. 7058, 7025-33	10,000	4½	Jany. & July.
53,000 U. S. of America 4½% Second Conv. Liberty Loan Bonds	53,000	4½	May & Nov. 15.
40,000 Suncrest Lumber Co. income mortgage bonds	40,000	6	Apr. & Oct. 1.

Cash:

Capital account	$15,000
Income "	46,582.83
Frederick Wesche & Helene J. Von Schierholz check acct.	40,996.81

(Endorsed:) Filed Feb. 21, 1921, at — o'clock A. M. George T. Cranmer, Clerk.

89 *Præcipe for Appearance of Frederick Wesche.*

In the District Court of the United States for the District of New Jersey.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money in the Hands of the Respondent, Commercial Trust Company of New Jersey.

SIR:

Please file this præcipe for appearance for Frederick Wesche as petitioner for leave to intervene in the above matter, and enter my appearance for him as such petitioner.

February 21, 1921.

Yours respectfully,

90 SELDEN BACON,
Solicitor for Frederick Wesche,
Petitioner for Leave to Intervene.

Office & Post Office Address, 43 Exchange Place, Borough o Manhattan, New York City.
Office in the District of New Jersey for Service of Papers, Fisk & Fisk, 15 Exchange Place, Jersey City, N. J.

To George T. Cranmer, Esq., Clerk of the United States Distric Court for the District of New Jersey.

Endorsed: Filed Feb. 21, 1921 at 4 o'clock P. M. George T. Cranmer, Clerk.

91 *Petition of Frederick Wesche for Leave to Intervene.*

In the District Court of the United States for the District Court o New Jersey.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alie Property Custodian, In re Certain Stocks, Bonds, Securities, an Money in the Hands of the Respondent.

Now comes Frederick Wesche, of Territet, Switzerland, named i the petition herein of the Alien Property Custodian and in th answer interposed by the Commercial Trust Company of New Jerse and shows to this Court that he repeats and states as part of thi petition, as fully as if here set forth and repeated at length, all th denials and matters alleged in his annexed proposed answer, Ex hibit A hereof, as intervener, and makes them all part of thi petition.

92 This petitioner proffers the said answer and asks leave t intervene herein and file the said answer and that he b heard upon the petition of the Alien Property Custodian herein, pr interesse suo, both by virtue of his rights as bailor and principal o said Commercial Trust Company of New Jersey, and as individua separate beneficial owner of a large part of the securities and money on hand, held by said Commercial Trust Company of New Jersey and of the indebtedness from that Company, all sought to be reache by the said Alien Property Custodian as petitioner herein, and a the agent charged with the custody and possession of the securitie and funds of his own several principals, Charles J. Ahrenfeldt Helene J. Von Schierholz and Lucy von Uxküll-Gyllenband in volved in this proceeding, and as being in possession through hi said bailee, the Commercial Trust Company of New Jersey of th said securities and checking and Trust Accounts, described in th annexed proposed answer and in the petition herein, and as credito

entitled to the sums due upon the checking and trust accounts therein mentioned and described.

Wherefore, your petitioner prays that he be allowed to intervene and file his annexed proposed answer to the petition of the Alien Property Custodian herein, pro interesse suo, that an examination and inquiry into this petitioner's rights and interests in the property and indebtedness sought to be recovered by the Alien
93 Property Custodian be had; and that your petitioner have such other and further relief as may be just.

FREDERICK WESCHE,
Petitioner,

By SELDEN BACON,
His Attorney in Fact.

SELDEN BACON,
Solicitor for Petitioner and Counsel.

Office & Post Office Address: No. 43 Exchange Place, Borough of Manhattan, New York City.

Office in the District of New Jersey for service of papers, Fisk & Fisk, Esqs., 15 Exchange Place, New Jersey, N. J.

STATE OF NEW YORK,
County of New York, ss:

Selden Bacon, being first duly sworn, deposes and says that he resides at 50 Vanderbilt Avenue, New York City, that he is a member of the Bar of this Court, and is the solicitor for the above named Frederick Wesche and his agent in this country, holding full power of attorney from said Wesche authorizing deponent to intervene in his behalf in this proceeding. Deponent further says that the reason that the foregoing petition is not verified by the said Wesche in person is that he is absent from the United States and in Switzerland, where he resides.

Deponent further says that he has read the foregoing petition and knows the contents thereof; that the matters therein
94 stated are true to the best of his knowledge, information and belief; that the matters alleged are true to his own knowledge, save and except those matters therein stated to be alleged on information and belief, and that as to those matters they are in accordance with his information and he believes them to be true.

Deponent further says that the sources of his information and grounds for his belief are correspondence with the said Frederick Wesche and with Charles J. Ahrenfeldt named in the said petition; personal conversations with said Frederick Wesche and said Charles J. Ahrenfeldt; correspondence and personal conversations with R. Newton Crane, Esq., a barrister of the Middle Temple of London, England, English Counsel for said Charles J. Ahrenfeldt and Frederick Wesche, and copies of the accounts kept by said Wesche of the funds held by him and of the accounts kept by the Commercial Trust Company of New Jersey, both of said Checking Account and said Trust Account, and statements made to this deponent by the

officers of said Commercial Trust Company of New Jersey and it Counsel, Mr. Anderson, also the petition of the Alien Property Cu todian herein.

SELDEN BACON.

Subscribed and sworn to before me this 26 day of January, 192
[Notarial Seal.] O. V. W. HAWKINS,
Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co. No. 4.
N. Y. Co. Register's No. 2202.

95 *Proposed Answer of Frederick Wesche.*

In the District Court of the United States for the District of Ne Jersey.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, an FREDERICK WESCHE, Intervener, Respondents.

In the Matter of the Application of FRANCIS P. GARVAN, as Alie Property Custodian, In re Certain Stocks, Bonds, Securities, an Money in the Hands of the Respondent, Commercial Trust Com pany of New Jersey.

Answer of Frederick Wesche.

The Answer of Frederick Wesche, Above-named Intervener an Respondent (interposed by Leave of Court First Had and O tained), to the Petition of the Above-named Petitioner, Franc P. Garvan, as Alien Property Custodian.

This respondent, on information and belief, says:

96 1.

This respondent is not a citizen of the United States but is a ci zen of Germany and is a resident of Territet, in the Canton of Va Switzerland, where his address is Villa Supplitt, and that ever sin the first week in August, 1914, he has been resident and domicil in the Republic of Switzerland, first in Lucerne, Switzerland, t to January, 1920, and since then in said Territet, and has duri all said period had, and now has, his domicile in said Switzerla Up to the time of taking up his residence and domicile in Switz land as aforesaid this respondent for more than thirty years h continuously resided and been domiciled in Paris, France.

For more than thirty-five years last past this respondent has n at any time been domiciled in or resident in either Germany,

ny part thereof, or in any country which was an ally of Germany n the war which broke out between Germany and France and other ountries in August, 1914, and into which the United States entered n April, 1917, nor has he during any part of such period, and articularly not since July 1st, 1914, been doing business in Ger- any or Austro-Hungary, or in any country which was an ally of ermany or Austro-Hungary in such war, and that he is not doing usiness in any such place now. Nor has this respondent at any time or more than forty years past, and particularly since January 1st, 914, been an officer, official or agent of the Government of Germany, or of that of Austro-Hungary or of any government of any Nation with which the United States is now or has since January 1, 1900, at any time been at war, or of any ation allied either with Germany or Austro-Hungary in such war, r of any political or municipal subdivision of either Germany or ustro-Hungary or of any such government or nation. And this espondent is not and never has been an enemy of the United States, or has he been within the United States at any time since 1913.

2.

The respondent admits the allegations contained in paragraphs umbered I and II of the petition of the above-named petitioner erein.

3.

This respondent has no knowledge or information sufficient to orm a belief as to the truth of any of the allegations contained in aragraph III of the petition of the above-named petitioner herein, ave and except only that this respondent is informed and believes hat in the month of December, 1917, the above-named Commercial rust Company of New Jersey, not knowing the real facts beyond he securities and sums on deposit with it, and the contracts under hich such deposits were made with it, made a report to the then lien Property Custodian, which it made for the purpose of safeguarding itself from liability to the United States of America, should it thereafter be determined upon competent evidence and proofs by competent authority that Helene von Schierholz in said petition named was an enemy and that such securiies, or any part thereof, belonged to her, or said sums or any part hereof were owing to her. This respondent has no knowledge or nformation sufficient to form a belief whether Exhibit A of the aid petition herein is a true and correct copy of the report so filed r whether the file number thereof is No. 8393 as alleged in the etition, but this respondent alleges on information and belief that uch report so made was filed in the office of the Alien Property ustodian prior to March 1st, 1918, and was in the possession of he Alien Property Custodian long prior to the signature of the riginal paper of which Exhibit B of the said petition purports to e a copy; and that said report contained a copy of the agreement

under which said securities and funds were deposited with said Commercial Trust Company, which agreement is substantially in the words shown in Schedule C of said Exhibit A of the petition, save that by subsequent agreement the rate of the Trust Company's compensation was on or about May 27th, 1913, reduced to 1 per cent. on the income; and that said Trust Company by such report asserted and informed the then Alien Property Custodian that the said Commercial Trust Company was not a Trustee, but a bailee for hire of the securities and a mere banking depositary of the funds deposited with it, and that said Helene von Schierholz was not the sole owner of said securities or said funds, nor were the same due to her, and that the same were not held by her or
99 for her, or her sole behalf, or her sole account, or for her sole benefit, but that she had no more than a fractional interest therein, and that this respondent was at least a co-owner thereof, and also beneficially interested therein; and gave notice and presumptive evidence to said Custodian that this respondent was not an enemy of the United States, and advised said Custodian of the address it had for this respondent, through which address this respondent could readily have been reached, and due inquiry as to the facts made of him.

This respondent admits and on information and belief alleges: That said Commercial Trust Company of New Jersey did on December 19th, 1917, hold, deposited with it, under and pursuant to the terms of the agreement set forth in Schedule C of Exhibit A of the petition herein, the securities described in Schedule E of Exhibit A of the Custodian's petition herein; and there had been deposited with said Trust Company by this respondent under the terms of the said agreement (save and except only that said agreement had been modified in writing on May 27th, 1913, by changing the rate of compensation for the services of the said Trust Company from two per cent. to one per cent. on income alone and without any charge on the corpus of the estate), and there then stood to the credit of the so-called Checking Account in the joint names of this respondent and said Helene von Schierholz the sum of $4,700.08, due this respondent, as stated in said Exhibit A of the petition.

This respondent, in information and belief, denies each
100 and every allegation contained in said paragraph III of said petition, save as hereinbefore expressly admitted and demands that the petitioner make due proof thereof.

4.

Answering paragraph IV of the petition of the above-named petitioner, this respondent admits and on information and belief alleges that the Commercial Trust Company had on March 28th, 1919, to the credit of the so-called Checking Account mentioned in said paragraph IV, which so ran in the joint names of this respondent and Helene J. von Schierholz, a balance of $39,190.76 and to the credit of the so-called Trust Account therein mentioned a balance

of $18,159.69. This respondent has no knowledge or information sufficient to form a belief as to the allegations in said paragraph IV of reports made to the petitioner by said Commercial Trust Company, and asks that the petitioner make due proof thereof.

This respondent denies on information and belief that the so-called checking account for $39,190.76 and the so-called trust account of $18,159.69 referred to in paragraph IV of the said petition were held in the manner therein alleged to have been reported by the respondent to the Alien Property Custodian or otherwise than as herein stated and set forth.

5.

This respondent, answering paragraph V of the petition
101 herein says he is informed and believes that on or about July 8th, 1918, there was delivered to the respondent Commercial Trust Company a paper of which Exhibit B of the petition purports to be a copy.

This respondent, on information and belief, alleges that A. Mitchell Palmer did not, as Alien Property Custodian, either personally or otherwise, prior to the said delivery of said paper Exhibit B, or at any time, investigate or determine after investigation that the securities and monies mentioned in said Exhibit B of the petition, or any of them, were either owing to or belonging to or held for, by, on account of, or on behalf of, or for the benefit of Helene L. von Schierholz, and alleges on information and belief that no investigation of the ownership or conditions of tenure thereof, or any thereof, aside from receiving such report from the Trust Company, was made or attempted by said Palmer as such Custodian, or on his behalf; and further alleges on information and belief that the information of the possession by the respondent Commercial Trust Company of New Jersey of such funds and securities specified in the report made by it to the Alien Property Custodian in December, 1917, as to which Exhibit B of the petition recites that such decision was made by said Palmer as such Alien Property Custodian after investigation, was derived solely from the report so made to him by said Commercial Trust Company of New Jersey, and such report itself contained and conveyed to said A. M. Palmer as such Alien Property Custodian information and notice that this
102 respondent was both an owner and a holder at law and interested as a beneficial owner in the securities held and money owned by the said Commercial Trust Company, described and mentioned in said report, and put said Palmer as such Custodian on inquiry as to the ownership of said securities and accounts, and the persons by and for whom and for whose account and benefit the same were held, and required of him investigation of the facts, especially through the sources of which said Trust Company so advised him.

This respondent further alleges on information and belief that neither said Palmer as such Alien Property Custodian, nor the petitioner, his successor, nor any of their respective subordinates, ever

made any inquiry of this respondent or of any one representing him, or attempted to make any inquiry of him or of any one representing him, as to the rights of this respondent in such securities or funds, or ever investigated or attempted to investigate the rights of this respondent in such securities or funds or to ascertain any of the facts concerning the beneficial ownership of such securities, funds, and indebtedness, all of which could have been readily ascertained by said Palmer, had he inquired as to the facts as to ownership and tenure of such property and indebtedness, of this respondent, whose Paris address had been so furnished to said Palmer as such Custodian; that any inquiries addressed to this respondent at his said Paris address since his departure to Switzerland have at all times been regularly forwarded to this respondent at his Swiss address, and this respondent's said Swiss address was at all
103 times after his removing to Switzerland in August, 1914, promptly furnished to any and all inquirers for him at his former Paris address; that so far as any pretended investigation was made or any information was secured by said Palmer as such Alien Property Custodian either personally or officially, such information had disclosed to him, prior to June 1st, 1918, not only that this respondent was a person to whom said securities legally belonged at least in part, and to whom said sums of money were legally owing and payable by said Commercial Trust Company of New Jersey, and for whose benefit and account and in whose behalf they were held; but had also disclosed to said Custodian that this respondent was at least in part the beneficial owner of said funds and securities and that said Helene von Schierholz was at most a beneficial owner of only a part thereof; that disregarding such information and without communication with this respondent or affording him any opportunity to be heard or to show his rights, and without inquiry or investigation, the said Alien Property Custodian secretly, without evidence to support his pretended conclusion, and without making the investigation required by law; and contrary to the information he had in his possession and to the proofs and notice that were before him of the rights of this respondent, and in fraud of the rights of this respondent (to whom no recourse to any Court was then afforded by the terms of the statute, which then afforded such recourse only to persons resident in the various judicial districts of the United States) fraudulently pretended that he, said Palmer, had duly in-
104 vestigated, and that he had personally examined and passed on the evidence obtained by investigation, when he had not done either; and fraudulently pretended by his said letter, Exhibit B of the petition, to have determined after examination and investigation (contrary to the evidence and information in his possession, and to the evidence immediately obtainable had he made real investigation, and contrary to the facts as they existed), that this respondent had no rights in such securities and monies, and that the same belonged exclusively to said Helene von Schierholz.

This respondent further alleges on information and belief, that any such pretended determination by the said A. Mitchell Palmer,

as Alien Property Custodian, as recited in said Exhibit B, that said securities belonged to Helene von Schierholz and that said sums of money were owing to her, was unlawful, fraudulent, null and void, and did not constitute due process of law, and was an attempt to deprive this respondent of his property without due process of law, and to take his private property for public use without compensation or opportunity to be heard, contrary to the provisions of the Fourth and Fifth amendments to the Constitution of the United States; and was in excess of any powers that the Congress of the United States and the President of the United States could confer, on such Custodian or on any other administrative officer, even when legislating under the war powers of Congress, and also contrary to the provisions of the Act of Congrss approved October 6, 1917, commonly known as the Trading with the Enemy Act, and the amend-
105 ments thereto theretofore adopted, and contrary to any authority conferred by the President of the United States on said Palmer as such Alien Property Custodian under said Act of October 6, 1917, and the amendments made thereto prior to the making of such pretended determination.

6.

Answering the allegations of paragraph VI of the said petition herein this respondent, on information and belief, denies that either the sum of $39,190.76 designated as "Checking Account" or the sum of $18,159.69 designated as a "Trust Account" or any part of either thereof was held by the respondent Trust Company subject to the demand of Helene J. von Schierholz, at any time or times after April 6, 1917, or under any other conditions or in any other way, at any time, than as hereinafter alleged. And this respondent, on information and belief, alleges that the right and power of said Helene J. von Schierholz at any time to demand delivery to her of any of said securities or monies was, from the making of such deposit, only a power in trust, as more fully hereinafter is set forth, which ceased and determined on the declaration of war by the United States against Germany on April 6, 1917, and that such power (save for the cash and securities individually belonging to her as hereinafter set forth) involved elements of personal trust and confidence and was not transferable.

This respondent admits, and on information and belief alleges, that Helen J. von Schierholz in the said petition named was, from and after the declaration of war by the United States on Ger-
106 many technically an enemy of the United States, and until the enactment of the Act of Congress of June 5, 1920, without a license to deal with said properties, or any thereof, save such license as was given by general proclamation in 1919. But this respondent alleges, on information and belief, that said Helene J. von Schierholz was born an American citizen on April 14th, 1856, in Paris, France, while her parents, who were then citizens of the United States, domiciled in Brooklyn, New York, were temporarily residing in Paris; that she is the daughter of the late Charles Ahren-

feldt of Kings County, New York, (who was by birth a subject of the King of Denmark, but was duly naturalized an American citizen on October 3rd, 1848, and who was domiciled and long resided in the City, as it then was, of Brooklyn, New York, and who retained his domicile there until his death on January 21st, 1893) and of Helene Ahrenfeldt, his wife, who was also an American citizen; that said Helene J. von Schierholz lost her American citizenship and became a German subject by her marriage on or about July 24th, 1879 (long prior to August 1st, 1914) to her husband Arthur von Schierholz, who was a German subject but died in January, 1899; that at the time of her said marriage said Helene J. von Schierholz was an American citizen; that such marriage occurred long prior to August 1, 1914, and that said Helene J. von Schierholz has been since April 6, 1917, and is still domiciled in Germany and there a resident.

107 Save and except as hereinbefore specifically admitted this respondent has no knowledge or information sufficient to form a belief as to the truth of any allegation contained in paragraph numbered "VI" of the said petition and therefore denies the same and each and every thereof and demands that the petitioner make due proof thereof.

7.

This respondent is informed and believes that the respondent Commercial Trust Company of New Jersey has failed and refused and continues to fail and refuse to convey, transfer, assign, deliver or pay to the petitioner the money and other property described in the petition, but still holds the same subject to the demand of this respondent.

Save and except as in this paragraph specifically admitted this respondent on information and belief denies each and every allegation contained in paragraph numbered VII of the petition herein.

8.

This respondent answering paragraph numbered "VIII" of the petition herein admits that this proceeding is brought by the petitioner as Alien Property Custodian of the United States.

9.

This respondent further alleges, on information and belief, that this respondent was for many years prior to his death a trusted business associate and friend of the late Charles Ahrenfeldt, of

108 Brooklyn, New York; and that this respondent is well over sixty years of age; that upon the death of said Charles Ahrenfeldt, above named, in 1893, as above set forth, his three children by his said wife Helene Ahrenfeldt, namely, Charles J. Ahrenfeldt, Helene von Schierholz (née Ahrenfeldt) named in the petition, and Lucy von Uxküll-Gyllenband (née Ahrenfeldt) derived and received from their said father's estate, assets and securities of large value;

That said Charles J. Ahrenfeldt is, and by and since his birth has at all times been an American citizen; that said Charles J. Ahrenfeldt has at all times since August 1st, 1914, resided and been in either England, or in France or in Switzerland, and has never been an enemy of the United States.

This respondent further alleges on information and belief that said Lucy von Uxküll-Gyllenband was born a citizen of the United States on April 25th, 1881, while her said parents, Charles Ahrenfeldt and Helene Ahrenfeldt, his wife, were domiciled in Brooklyn, but temporarily residing in Paris, France, as above stated; that said Lucy von Uxküll-Gyllenband lost her original American citizenship and became a German subject about 1885 by her marriage to a German subject, one Hans von Wangenheim, from whom she thereafter obtained a valid decree of divorce in the German courts, prior to 1897. Thereafter and in 1897 she was again married to Count Woldemar von Uxküll-Gyllenband, also a German subject, and has ever since resided in Germany, and is now there resident in
109 the city of Berlin; and that, at the time of her said first marriage to said von Wangenheim, said Lucy von Uxküll-Gyllenband was an American citizen, and became a German subject by that marriage.

10.

This respondent further alleges, on information and belief, that prior to January 30th, 1913, said Charles J. Ahrenfeldt, said Helene von Schierholz and said Lucy von Uxküll-Gyllenband, reposing trust and confidence in this respondent, had respectively placed in his hands various sums of money and American securities belonging to them respectively in severalty, all derived as aforesaid by them severally from said Charles Ahrenfeldt, deceased, and all situate in this country, to be cared for by this respondent as the agent of them respectively, with power to this respondent to make investments and changes in investments thereof from time to time, with the approval of said Charles J. Ahrenfeldt, and with the understanding that this respondent might likewise, along with such funds, invest other funds of his own, but that while the ownership of such securities and funds should at all times be kept several, the cash at any time on deposit should be carried in the name of the respondent, though belonging to said several parties in their respective proportions.

11.

This respondent further alleges, on information and belief, that in January 1913, it was agreed among the said four parties
110 (viz.: this respondent, said Charles J. Ahrenfeldt, said Helene von Schierholz and Lucy von Uxküll-Gyllenband) that certain securities and some cash then so held by this respondent, belonging to them in severalty as aforesaid, should be deposited by him in the above-named Commercial Trust Company of New Jersey, and that for convenience, in case of any supervening disability of this respondent, such cash and securities should be deposited in the

joint names of this respondent and of said Helene von Schierholz, with power (as between themselves and said Trust Company) to either of them to withdraw the same; but with the definite understanding and agreement among all said four parties that said Helene von Schierholz should exercise such power only in case of disability of this respondent, and then only subject to the like responsibility as this respondent was at all times under, to return to any one of the respective owners, his or her securities and his or her part of the cash, upon demand, but leaving with this respondent power and authority in his own discretion at any time and from time to time to withdraw any and all securities or moneys deposited with said Trust Company.

12.

This respondent further alleges, on information and belief, that all securities and cash so entrusted to this respondent by said Helene J. von Schierholz and Lucy von Uxküll-Gyllenband respectively were property derived by them respectively from their said father
111 Charles Ahrenfeldt, deceased, or his estate, or securities into which property so derived by them had been changed by them respectively; and that none of said property so owned by them, or either of them, deposited in said Commercial Trust Company in the joint names of this respondent and said Helene J. von Schierholz, was acquired by either of them, either directly or indirectly from any citizen or subject of Germany or Austro-Hungary or of any country allied with either of those countries in the said war.

13.

This respondent further alleges, on information and belief, that pursuant to such arrangement between this respondent, said Charles J. Ahrenfeldt, said Helene J. von Schierholz and Lucy von Uxküll-Gyllenband, in January, 1913, and thereafter, this respondent and said Helene J. von Schierholz entered into an agreement with said Commercial Trust Company of New Jersey set forth in Schedule C of Exhibit 1 of the petition herein, and thereafter, to wit, in May 1913, by written agreement between them and said Commercial Trust Company said agreement was modified so as to provide that said Trust Company's commissions should be one per cent. on income alone, instead of two per cent, as originally provided.

14.

This respondent further alleges, on information and belief, that pursuant to such arrangement this respondent thereupon on
112 or about January 30th, 1913, deposited with said Commercial Trust Company of New Jersey, under said agreement with it, sundry American securities and cash belonging respectively to this respondent, to said Charles J. Ahrenfeldt, to said Helene J. von Schierholz and to said Lucy von Uxküll-Gyllenband, all previously held by this respondent, part as individual owner of certain

thereof, and the remainder as such agent of said Charles, of said Helene and of said Lucy, respectively, as several owners of such individual sums and securities respectively.

That thereafter pursuant to such power to change investments so reposed in this respondent, and with the advice and approval of said Charles J. Ahrenfeldt, this respondent changed various investments so held for the said several parties in interest, and some bonds held for them respectively were paid off, and on December 19th, 1917 the cash and securities so deposited with said Commercial Trust Company of New Jersey, under said agreement with it as so modified as hereinbefore alleged, consisted of a balance of $4,700.08 cash due from said Trust Company and the securities set forth in Schedule E of Exhibit 1 of the petition of the Alien Property Custodian herein.

That such cash balance due on December 19th, 1917, from the said Trust Company and securities then so deposited with it, of which it was a mere bailee, were then owned in severalty as follows:

113 1. By this respondent individually:

Cash $1,074.23

$10,000 bonds of Vancouver Lumber Co. Ltd.
2,000 " " Kings County Lighting Co.
3,000 " " Adirondack Electric Power Co.
5,000 " " Hudson Navigation Co.
15,000 " " Champion Lumber Co.
5,000 " " New Netherlands Theatre Co.
5,000 " " Duluth Street Railway Co.
24,000 " " Central Georgia Power Co.
6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
9,800 United States bonds of the 2d Liberty Loan.

2. By said Charles J. Ahrenfeldt individually:

Cash $303.73

$10,000 bonds of Vancouver Lumber Co. Ltd.
5,000 " " Hudson Navigation Co.
15,000 " " Champion Lumber Co.
5,000 " " New Netherlands Theatre Co.
5,000 " " Central Georgia Power Co.
5,000 " " Omaha Waterworks.
8,000 United States bonds of the 2d Liberty Loan.

3. By said Helen J. von Schierholz:

Cash $1,164.71

$5,000 bonds of Vancouver Lumber Co. Ltd.
7,000 " " Tacoma Eastern R. R. Co.
28,000 " " City of Chicago.

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5,000 " " Montreal Tramways Co.
5,000 " " Gulf & Ship Island Railway.
5,000 " " Kings County Lighting Co.
5,000 " " City of Memphis bearing 4¼% interest.
7,000 " " Adirondack Electric Power Co.
5,000 " " Norfolk Southern R. R. Co.
5,000 " " Champion Lumber Co.
10,000 " " Jersey City (Water).
2,000 " " Clearview Coal Co.
5,000 " " Duluth Street Railway Co.
5,000 " " Central Georgia Power Co.
5,000 " " Westchester Lighting Co.
42,000 Stock of the City of New York.
16,500 United States bonds of the 2d Liberty Loan.

4. By said Lucy von Uxküll-Gyllenband individually:

Cash $2,157.41

$5,000 bonds of Vancouver Lumber Co. Ltd.
2,000 " " Tacoma Eastern R. R. Co.
5,000 " " Gulf & Ship Island R. R. Co.
3,000 " " Kings County Lighting Co.
11,000 " " City of Memphis bearing 4½% interest.
5,000 " " Champion Lumber Co.
10,000 " " Jersey City (Water).
3,000 " " Clearview Coal Co.
6,000 " " Duluth Street Railway Co.
6,000 " " Central Georgia Power Co.
10,000 " " Los Angeles Water Works.

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5,000 " " Westchester Lighting Co.
83,000 stock of the City of New York.
5,000 bonds of Omaha Water Works.
18,700 United States bonds of the 2d Liberty Loan.

That all said securities had been owned in severalty by the said several individuals as above set forth from a time prior to March 1st, 1914, save and except that:

1. Each of the said lots of Liberty Bonds had been bought with cash on hand then on deposit in said "Checking" account with said Commercial Trust Company, belonging to the individual so acquiring such bonds, on the 6th day of October, 1917.

2. Said Helene J. von Schierholz had acquired $2,000 of her Kings County Lighting Co. bonds, $5,000 of her Adirondack Electric Power Company bonds and her $2,000 Clearview Coal Company bonds on or about March 7th, 1914, and prior to August 1st, 1914, by purchase from said Charles J. Ahrenfeldt for cash belonging to her.

3. Said Lucy von Uxküll-Gyllenband had acquired her $3,000. Kings County Lighting Co. bonds, her $3,000 Clearview Coal Company bonds and her $6,000 Duluth Street Railway Co. bonds on or about March 6, 1914 and prior to August 1st, 1914 by purchase from said Charles J. Ahrenfeldt, for cash belonging to her.

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16.

This respondent further alleges on information and belief that thereafter and on the 3d day of January, 1918, said Vancouver Lumber Company bonds aggregating $30,000 were paid off, and various coupons belonging to said securities were collected aggregating (net) $3,104.89 and on December 28th, 1917, $11.42 interest accruing on the balances in the said account was credited on said account and on the 3rd day of January, 1918, the securities so held by this respondent individually and as such agent of the said several parties and deposited with the Commercial Trust Company of New Jersey under said agreement in the said account, and all derived from the said sources, consisted of the following items belonging to the several parties respectively as follows:

1. Individual property of this respondent:

Cash $11,497.59

$2,000 bonds of Kings County Lighting Company
$3,000 " " Adirondack Electric Power Company
$5,000 " " Hudson Navigation Company
$15,000 " " Champion Lumber Company
$5,000 " " New Netherlands Theatre Company
$5,000 " " Duluth Street Railway Company
$24,000 " " Central Georgia Power Company

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$6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
$9,800 United States bonds of the Second Liberty Loan

2. Individual property of Charles J. Ahrenfeldt:

Cash $10,712.85

$5,000 bonds of Hudson Navigation Company
$15,000 " " Champion Leather Company
$5,000 " " New Netherlands Theatre Company
$5,000 " " Central Georgia Power Company
$5,000 " " Omaha Water Works
$8,000 United States bonds of the Second Liberty Loan

3. Individual property of Helene J. von Schierholz:

Cash $7,690.90

$7,000 bonds of Tacoma Eastern R. R. Company
$28,000 " " the City of Chicago
$5,000 " " Montreal Tramways
$5,000 " " Gulf & Ship Island Railway
$5,000 " " Kings County Lighting Company
$5,000 " " City of Memphis, bearing 4¼% interest
$7,000 " " Adirondack Electric Power Co.

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$5,000 " " Norfolk Southern R. R. Co.
$5,000 " " Champion Lumber Company
$10,000 " " Jersey City (Water Works)
$2,000 " " the Clearview Coal Company
$5,000 " " Duluth Street Railway
$5,000 " " Central Georgia Power Company
$5,000 " " Westchester Lighting Company
$42,000 stock of the City of New York
$16,500 United States bonds of the Second Liberty Loan

4. Individual property of Lucy von Uxküll-Gyllenband:

Cash $7,915.05

$2,000 bonds of Tacoma Eastern R. R. Co.
$5,000 " " Gulf & Ship Island R. R. Co.
$3,000 " " Kings County Lighting Company
$5,000 " " Champion Lumber Company
$11,000 " " City of Memphis, bearing 4½% interest
$10,000 " " Jersey City (Water)
$3,000 " " the Clearview Coal Company
$6,000 " " the Duluth Street Railway Co.
$6,000 " " Central Georgia Power Company
$10,000 " " Los Angeles Water Works
$5,000 " " Westchester Lighting Company

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$83,000 stock of the City of New York
$5,000 bonds of Omaha Water Works
$18,700 United States bonds of the Second Liberty Loan

17.

This respondent further alleges on information and belief that subsequently under the said authority conferred on this respondent and with the approval of said Charles J. Ahrenfeldt the Champion Lumber Company bonds above mentioned were exchanged on behalf of each of the said several owners thereof for a like amount of bonds of the Suncrest Lumber Company, which had taken over the business of said Champion Lumber Company.

18.

This respondent further alleges on information and belief that the various balances due from the Trust Company on the Checking Account were as far as its relations were concerned a debt due from said Trust Company; but as between this respondent, said Ahrenfeldt, said Helene von Schierholz and said Lucy von Uxküll-Gyllenband the sums deposited with said Trust Company constituted a fund in which they were severally and individually interested in the amounts herein shown. For convenience the sums deposited with the Trust Company are at times herein referred to as a fund. Said Trust Account has from its inception all been set aside and is held
120 by said Commercial Trust Company on deposit in another Trust Company as a separate fund.

19.

This respondent further alleges on information and belief that out of the cash on hand on January 3rd, 1918, above shown, which was all held in the Checking Account mentioned in the petition, there was paid out on March 26th, 1918, the sum of $42.60, of which $37.18 was this respondent's money, $2.21 money of the said Charles J. Ahrenfeldt, $1.60 money of the said Helene J. von Schierholz and $1.61 money of the said Lucy von Uxküll-Gyllenband.

That the only other changes in the said checking account from and after January 3rd, 1918, were additions of interest accrued on the balances in the account, which belonged severally to the individual owners of the funds on deposit in said account as earned thereby and such individual shares of interest earned, up to September 18th, 1920, were as follows:

To this respondent individually	$978.05
To Charles J. Ahrenfeldt individually	913.81
To Helene J. von Schierholz individually	656.01
To Lucy von Uxküll-Gyllenband individually	675.15
Total	$3,223.02

20.

This respondent further alleges on information and belief that the total amount of cash in said checking account on March
121 28th, 1919 was $39,190.76, which belonged:

To this respondent individually	$11,890.48
To Charles J. Ahrenfeldt individually	11,112.36
To Helene J. von Schierholz individually	7,977.67
To Lucy von Uxküll-Gyllenband individually	8,210.25
	$39,190.76

21.

This respondent further alleges on information and belief that additional interest was earned on the balances in said checking account and credited thereon after March 28th, 1919 and up to and including September 28th, 1920 aggregating $1,806.05, bringing the balance to the credit of said checking account on that date up to $40,996.81, which entire sum belongs

To this respondent individually	$12,438.46
To Charles J. Ahrenfeldt individually	11,624.45
To Helene J. von Schierholz individually	8,345.31
To Lucy von Uxküll-Gyllenband individually	8,588.59
	$40,996.81

22.

This respondent further alleges on information and belief that since September 28th, 1920 said balance in the so-called
122 Checking Account has been and is now earning additional interest, which additional interest as earned belongs to this respondent, to said Charles J. Ahrenfeldt, to said Helene J. von Schierholz and to said Lucy von Uxküll-Gyllenband in proportion to their several interests therein on September 28th, 1920.

23.

This respondent further alleges on information and belief that the so-called Trust Account referred to in the petition, was created after January 3d, 1918, and consists exclusively of sums collected by said Commercial Trust Company since February 1st, 1918, as interest on the said several securities so deposited with it as above set forth, owned by the said several persons, and of the sums collected as principal of said $5,000 Clearview Coal Company bonds on April 7th, 1920, and as principal of said $10,000 New Netherlands Theatre Company bonds on May 3d, 1920, and of interest accrued on the balances so placed to the credit of said account, less the commissions charged by said Trust Company under said agreements with it.

24.

This respondent further alleges on information and belief that all sums so deposited to the credit of said so-called Trust Account belonged individually to one or other of said four persons, to wit, this respondent, said Charles J. Ahrenfeldt, said Helene J.
123 von Schierholz and said Lucy von Uxküll-Gyllenband in severally, in accordance with their respective ownership of the securities from which the said several sums so deposited were received.

25.

This respondent further alleges on information and belief that on March 28th, 1910 the sums credited to said Trust Account, above all commissions charged thereon amounted to the aggregate sum of $18,159.69, which sum belonged to the said four persons respectively in severalty as follows:

To this respondent individually:

Coupons and interest from his said securities	$3,093.01
Interest accrued on such deposit thereof	37.29
	$3,130.30

To said Charles J. Ahrenfeldt individually:

Coupons and interest from his said securities	$1,539.46
Interest accrued on such deposit thereof	17.88
	$1,557.34

To said Helene von Schierholz individually:

Coupons and interest from her said securities	$6,566.81
Interest accrued on such deposit thereof	67.62
	$6,634.43

124 To said Lucy von Uxküll-Gyllenband individually:

Coupons and interest from her said securities	$6,760.56
Interest accrued on such deposit thereof	77.06
	$6,837.62

26.

This respondent further alleges on information and belief that on October 1st, 1920 the sums credited to said Trust Account above all commissions so charged thereon amounted to the aggregate sum of $61,583.83, which sum belonged to the said four persons respectively in severalty, as follows:

To this respondent individually	$12,924.99
To Charles J. Ahrenfeldt individually	8,862.16
To Helene J. von Schierholz individually	19,0[illegible]3.99
To Lucy von Uxküll-Gyllenband individually	20,732.69
Total	$61,583.83

and that by a bookkeeper's error said Commercial Trust Company made an overcharge of $1.00 commission on October 1st, 1920 on credits amounting to $907.15, charging $10.07 commissions instead of but $9.07, and the balance disclosed by it as of October, 1920 in its answer is $1.00 less than the actual balance.

125 27.

This respondent further alleges on information and belief that of the net sums so credited to said Trust Account (deducting its said erroneous charge of $1) the following were the sources, all being derived from the above-mentioned securities:

1. Sums belonging to this respondent individually:

Principal of $5,000. New Netherlands Theatre bonds paid off belonging individually to this respondent....	$5,000.00
Amounts of interest or coupons collected on the individual securities above described belonging to this defendant individually, so deposited with said Commercial Trust Company of New Jersey (less commissions of 1%)	7,526.77
Amounts of interest credited growing out of the above amounts credited to said Trust account belonging to this respondent individually (less commissions of 1%)	398.22
	$12,924.99

126 2. Sums belonging to Charles J. Ahrenfeldt individually:

Principal of $5,000. New Netherlands Theatre bonds paid off belonging individually to said Charles J. Ahrenfeldt	$5,000.00
Amounts of interest or coupons collected on the individual securities above described belonging to said Charles J. Ahrenfeldt individually, so deposited with said Commercial Trust Company of New Jersey (less commissions of 1%)	3,639.53
Amounts of interest credited growing out of the above amounts credited to said Trust account belonging to said Charles J. Ahrenfeldt individually (less commissions of 1%)	222.63
	$8,862.16

3. Sums belonging to Helene J. von Schierholz individually:

Principal of $2,000. Clearview Coal Company bonds paid off belonging individually to said Helene J. von Schierholz	$2,000.00
Amounts of interest or coupons collected on the individual securities above described belonging to	
127 said Helene J. von Schierholz individually, so deposited with said Commercial Trust Company of New Jersey (less commissions of 1%).....	16,338.35
Amounts of interest credited, growing out of the above amounts credited to said account belonging to said Helene J. von Schierholz individually (less 1% commissions)	725.64
	$19,063.99

4. Sums belonging to Lucy von Uxküll-Gyllenband individually:

Principal of $3,000. Clearview Coal Company bonds paid off belonging individually to said Lucy von Uxküll-Gyllenband on Trust Company in January 1918	$3,000.00
Amounts of interest or coupons collected on the individual securities above described belonging to said Lucy von Uxküll-Gyllenband, individually, so deposited with said Commercial Trust Company of New Jersey, less commissions of 1%)	16,946.86
128 Amounts of interest credited to such Trust Account accruing on the above amounts credited to said accounts belonging to said Lucy von Uxküll-Gyllenband individually (less commissions of 1%)	785.53
	$20,732.69

28.

This respondent further alleges on information and belief that in addition to said sums additional coupons are from time to time collected belonging to said four several individuals, cut from their said securities, which belong to them respectively in severalty, and additional interest is being earned on their several balances deposited in said account, all of which belong to them severally.

29.

This respondent further alleges on information and belief that the securities still in the hands of said Commercial Trust Company of New Jersey so deposited with it now consist of the following securities owned severally by the following individuals respectively:

1. Securities owned by this respondent individually:

$2,000 bonds of Kings County Lighting Company.
3,000 " " Adirondack Electric Power Company.

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5,000 " " Hudson Navigation Company.
15,000 " " Suncrest Lumber Company.
5,000 " " Duluth Street Railway.
24,000 " " Central Georgia Power Company.
6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
9,800 United States bonds (2d Liberty Loan).

2. Securities owned by said Charles J. Ahrenfeldt individually:

$5,000 bonds of Hudson Navigation Company.
15,000 " " Suncrest Lumber Company.
5,000 " " Central Georgia Power Company.
5,000 " " Omaha (Water Works).
8,000 United States bonds (2d Liberty Loan).

3. Securities owned by said Helene J. von Schierholz individually:

$7,000 bonds of Tacoma Eastern R. R. Co.
28,000 " " City of Chicago (City Hall 4s).
5,000 " " Montreal Tramways.
5,000 " " Gulf & Ship Island Ry. Co.
5,000 " " Kings County Lighting Co.
5,000 " " the City of Memphis (4¼%).
7,000 " " " Adirondack Electric Power Company.

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$5,000 " " " Norfolk Southern R. R. Co.
5,000 " " " Suncrest Lumber Company.
10,000 " " Jersey City, Water Works.
5,000 " " the Duluth Street Railway.
5,000 " " " Georgia Central Power Co.
5,000 " " " Westchester Lighting Company.
42,000 stock of the City of New York.
16,500 United States bonds (2d Liberty Loan).

4. Securities owned by said Lucy von Uxküll-Gyllenband individually:

$2,000 bonds of Tacoma Eastern R. R. Co.
5,000 " " Gulf & Ship Island Ry.
3,000 " " Kings County Lighting Co.
11,000 " " the City of Memphis (4½%).
5,000 " " Suncrest Lumber Company.
10,000 " " Jersey City—Water Works.
6,000 " " Duluth Street Railway.
6,000 " " Central Georgia Power Co.
10,000 " " City of Los Angeles (Water Works).
5,000 " " Westchester Lighting Company.
83,000 stock of the City of New York.
5,000 bonds of Omaha (Water Works).
18,700 United States bonds (2d Liberty Loan).

131 That such securities so owned are in each instance accompanied by all coupons thereto belonging maturing since October 1st, 1920 (save as any such coupons have been collected since October 1st, 1920 and thereafter credited to said Trust Account) and the coupons and any proceeds so collected and any interest accruing thereon are the several property of said several owners of the securities to which they pertain. All the said several securities herein mentioned other than the said United States bonds are securities issued by various American private or municipal corporations.

30.

This respondent further alleges on information and belief that the above-named securities and the above described indebtedness and sums of cash so set apart, all of which are so claimed by this respond-

ent, are the identical securities, indebtedness and particular funds of cash which the Alien Property Custodian, as petitioner herein, is asking to have directed turned over to him by order and decree of this Court upon his petition herein.

31.

This respondent further alleges on information and belief that he was at all times and still is the agent of said Charles J. Ahrenfeldt, of said Helene J. von Schierholz and of said Lucy von Uxküll-Gyllenband, in charge of their said respective securities and moneys, and holder of his own, and this relation was not changed by the
132 arrangement for deposit of said securities and cash in the joint names of this respondent and said Helene J. von Schierholz any further than this: that she should be able to act as an alternate for this respondent in withdrawing such securities and cash in event of the death or other disability of this respondent; that it was a term of the arrangement between the said four principals for such deposit in the joint names of this respondent and said Helene J. von Schierholz with the Commercial Trust Company of New Jersey, that she should act only as such alternate in such event, and she was given such power only upon that trust; that said Helene J. von Schierholz has at all times observed said trust and has not at any time from the inception of such deposit in January 1913, interfered in any way with the conduct of such agency by this respondent, who has at all times been the sole person actually in charge of such securities and funds.

This respondent further alleges on information and belief that the attempt of the Alien Property Custodian to seize such funds, under the power conferred upon said Helene J. von Schierholz by the making of the deposit in the joint names of this respondent and herself, is contrary to the terms of the arrangement and the trust under which she was so made a co-depositor, and under which such deposits with the Trust Company were made by this respondent, that she should act only as such alternate, and only in the event of the death or disability of this respondent, and in breach of the trust duties and relations imposed on her by such arrangement, to all of which
133 the Custodian would, if he could have taken over her said power, have ipso facto been subject; that this respondent has not at any time been under any disability to act, and neither the time nor the occasion when said Helene J. von Schierholz would be justified in withdrawing any of said cash or securities by virtue of the deposit in the joint names of this respondent and herself has ever arisen; and that the attempt of the Custodian to obtain such funds and securities by virtue of her being so named as joint depositor and the provisions of the agreement with said Commercial Trust Company, if he had the power to exercise the power held by said Helene von Schierholz, was a breach of the trust duties assumed by her, (upon the assumption of which alone she was named as such joint depositor on the terms stated in such contracts with the said Commercial Trust Company), and in fraud of the rights of this respondent.

33.

This respondent further alleges on information and belief that all the foregoing facts would have been promptly and fully disclosed to the said A. Mitchell Palmer or the petitioner, his successor, as Alien Property Custodian or their representatives had they or any of them, either in 1918 or at any other time made due inquiry or investigation into the rights to the said funds and securities so deposited with the Commercial Trust Company, and the sums on deposit with it, or the ownership and tenure thereof; that
134 none of them made any investigation whatever into the ownership or tenure or conditions thereof beyond seeking and obtaining such report from said Commercial Trust Company.

34.

This respondent further alleges on information and belief that since the said pretended determination by the former Alien Property Custodian recited in said Exhibit B of the petition as made in 1918, and which, if made at all, was made without any investigation of the facts relative to the ownership, tenure and conditions of said securities, debts and funds, the Act of Congress of June 5, 1920, amending the Trading with the Enemy Act has been enacted. And this respondent contends that by virtue thereof and the original American citizenship of said Helene J. von Schierholz and Lucy von Uxküll-Gyllenband (lost only by their respective marriages to German subjects long prior to 1914), the Alien Property Custodian has lost all right to claim or take over the portions of said funds and securities belonging to them severally.

35.

This respondent further alleges that long prior to the commencement of this proceeding, and after the enactment of the Act of Congress of June 5, 1920, to wit, on the 8th day of July, 1920, this respondent demanded of the said Commercial Trust Company payment to him of all the said balances in the said Checking
135 Account and said Trust Account, so agreed to be paid to him on his demand, and all said securities so deposited with it. That said demand was made in good faith and without any collusion with said respondent Trust Company. That in making such demand this respondent acted as owner of his own part and as such trust agent for his said several principals Charles J. Ahrenfeldt, Helene J. von Schierholz and Lucy von Uxküll-Gyllenband, charged by them respectively with the duty of holding their respective securities and cash.

36.

This respondent further alleges on information and belief, that said Commercial Trust Company of New Jersey holds all said funds

and securities and owes the moneys hereinbefore set forth as bailee, depositary and debtor of this respondent; that its possession thereof is his possession; and that this respondent is entitled to intervene and be heard in this proceeding pro interesse suo both as such bailor and creditor, and also as the individual several owner of the cash and securities hereinbefore specified and also as agent in possession of the securities and cash belonging severally to his said several principals Charles J. Ahrenfeldt, Helene J. von Schierholz and Lucy von Uxküll-Gyllenband; and that any order or decree of this Court directing any disposition of such funds or securities without first giving this respondent his day in Court, will be contrary to law and to the provisions of the fourth and fifth amendments to the Constitution of the United States.

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37.

This respondent further alleges on information and belief that no investigation and no determination after investigation of the ownership or holding of the securities and moneys in the hands of the Commercial Trust Company of New Jersey hereinbefore described, such as was contemplated by the provisions of the Trading with the Enemy Act has ever been made by either the former Alien Property Custodian or the present Alien Property Custodian or any representative of either, and that the present proceeding is an attempt simply to ignore the rights and interests of this respondent, to take the private property of this respondent for public use, without just compensation, and to deprive him of his property without due process of law and in violation of the right of this respondent to be secure in his effects against unreasonable seizure, guaranteed by the fourth article of Amendment to the Constitution of the United States, and also without warrant issued upon proper cause supported by oath or affirmation and particularly describing the things to be seized. And this respondent calls particular attention to the fact that the Alien Property Custodian in his petition herein, while sedulously alleging that the said A. Mitchell Palmer did investigate and after investigation determine that said Helene J. von Schierholz was in 1918 an enemy of the United States, has wholly and apparently sedulously avoided alleging that either said Palmer as such Alien Property Custodian or said petitioner, his successor, has ever investigated or determined after investigation that the in-
137 debtedness of the Trust Company and the property mentioned in Exhibit A of said Custodian's petition, was by the Trust Company owing to or belonged to or by it held for, by, on account of, or for the benefit of said Helene von Schierholz.

38.

This respondent further alleges on information and belief that Ernest T. Greiner, named in the answer of said Commercial Trust Company to the petition herein, was at one time an employee of this respondent; that he is not now and has not been for more than

eight months last past; that said Greiner has neither lien nor color of lien on any of the said funds or securities so in the hands of said Commercial Trust Company, and this respondent prays that if said Greiner be allowed to intervene or answer herein this respondent be permitted to answer any claims he may make or matters that he may assert.

Wherefore, this respondent prays that an examination pro interesse suo into his rights and interests in the property and indebtedness petitioned for by the Custodian be had and the rights and interests of this respondent therein be determined; that the prayer of the petition be denied; that the said Commercial Trust Company of New Jersey be ordered and directed to deliver to this respondent all the securities and funds so held by it, and particularly those specifically shown to be the individual several property of this re-
138 spondent, and also to him as agent, those above shown to be the individual and several property of this respondent's said several principals, Charles J. Ahrenfeldt, Helene J. von Schierholz and Lucy von Uxküll-Gyllenband, and that this respondent have such other and further relief in the premises as may be just.

FREDERICK WESCHE,
Respondent,
By SELDEN BACON,
His Attorney in Fact.
SELDEN BACON,
Solicitor for Respondent Wesche and Counsel.

Office and Post-office Address, No. 43 Exchange Place, Borough of Manhattan, New York City.

Office in the District of New Jersey at which papers can be served: Fisk & Fisk, Esqs., 15 Exchange Place, Jersey City, New Jersey.

STATE OF NEW YORK,
County of New York, ss:

Selden Bacon, being first duly sworn, deposes and says that he resides at No. 50 Vanderbilt Avenue in the Borough of Manhattan in the City and State of New York and has his office at No.
139 43 Exchange Place, in said Borough of Manhattan; that he is a member of the Bar of this Court and is the solicitor and counsel for the above named Frederick Wesche and is his agent in this country, holding broad power of attorney from said Wesche, including power to act for him in this proceeding. Deponent further says that the reason that the foregoing answer is not verified by the said Wesche in person is because he is absent from the United States and in Switzerland, where he resides.

Deponent further says that he has read the foregoing answer and knows the contents thereof; that the matters therein stated are true to the best of his knowledge, information and belief; that the matters alleged are true of his own knowledge, save and except those matters therein stated to be alleged on information and belief, and that as to those matters they are in accordance with deponent's information and he believes them to be true.

Deponent further says that the sources of his information and grounds for his belief are correspondence with the said Frederick Wesche and with Charles J. Ahrenfeldt named in the said answer; personal conversations with said Frederick Wesche and said Charles J. Ahrenfeldt; correspondence and personal conversations with R. Newton Crane, Esq., a barrister of the Middle Temple of London, England, English Counsel for said Charles J. Ahrenfeldt and Frederick Wesche, and copies of the accounts kept by said Wesche of the funds and securities kept here by him, and copies of the accounts kept by the Commercial Trust Company of New Jersey, both of said Checking Account and said Trust Fund, furnished deponent by said Commercial Trust Company, and statements made to this deponent by the officers of said Commercial Trust Company of New Jersey and its Counsel, Mr. Anderson, also the petition of the Alien Property Custodian herein.

SELDEN BACON.

Subscribed and sworn to before me this 26th day of January, 1921.

[Notarial Seal.] O. V. W. HAWKINS,
Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co. No. 4.
N. Y. Co. Register's No. 2002.

(Endorsed:) Filed Oct. 22, 1921, at 9 o'clock A. M. George T. Cranmer, Clerk.

141 *Præcipe for Appearance of Charles J. Ahrenfeldt.*

In the District Court of the United States for the District of New Jersey.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money in the Hands of the Respondent, Commercial Trust Company of New Jersey.

SIR:

Please file this præcipe for appearance for Charles J. Ahrenfeldt petitioner for leave to intervene in the above matter, and
142 enter my appearance for him as such petitioner.
February 21, 1921.

Yours respectfully,

SELDEN BACON,
Solicitor for Charles J. Ahrenfeldt,
Petitioner for Leave to Intervene.

Office & Post Office Address, 43 Exchange Place, Borough of Manhattan, New York City.
Office in the District of New Jersey, for service of papers Fisk & Fisk, 15 Exchange Place, Jersey City, N. J.

To George T. Cranmer, Esq., Clerk of the United States District Court for the District of New Jersey.
(Endorsed:) Filed Feb. 21, 1921 at 4 o'clock P. M. George T. Cranmer, Clerk.

143 *Petition of Charles J. Ahrenfeldt for Leave to Intervene.*

In the District Court of the United States for the District of New Jersey.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money in the Hands of the Respondent.

Now comes Charles J. Ahrenfeldt of London, England, a citizen of the United States, and shows to this Court that he repeats and states as part of this petition, as fully as if set forth and repeated at length, all the denials and matters alleged in his annexed proposed answer, Exhibit A hereof, as intervener, and makes them all part of this petition.

This petitioner proffers the said answer and asks leave to intervene herein and file the said answer and that he be heard upon the petition of the Alien Property Custodian herein, pro interesse
144 suo, as individual separate owner of a large part of the securities and moneys on hand, held by said Commercial Trust Company of New Jersey, sought to be reached by the said Alien Property Custodian as petitioner herein, which part of the individual several property of this petitioner consists of the following securities held by said Commercial Trust Company of New Jersey and sought to be recovered by the Alien Property Custodian above named in this proceeding, namely,

$5,000 Bonds of Hudson Navigation Company,
15,000 Bonds of Suncrest Lumber Company,
5,000 Bonds of Central Georgia Power Company,
5,000 Bonds of City of Omaha (Water Works).
8,000 United States Bonds of Second Liberty Loan.

and to the following amounts of cash sought to be recovered by the said Alien Property Custodian in and by this proceeding, to wit,

$8,862.16 of $61,583.83 in the so-called Trust Account mentioned in the Custodian's petition, which was to the credit of that account on October 1st, 1920, and the sum of $11,624.45 to the credit of the so-called Checking Account mentioned in the petition of the Custodian out of the balance of $40,996.81 to the credit of the Checking Account mentioned in the petition of the Alien Property Custodian herein, which was to the credit of that account on
145 September 28th, 1920, together with any interest subsequently accruing on said sums and the proceeds of any coupons

collected on the said securities so individually belonging to this petitioner, since the 1st day of October, 1920, and as creditor entitled to the said sums.

Wherefore, your petitioner prays that he be allowed to intervene and file his annexed proposed answer to the petition of the Alien Property Custodian herein, pro interesse suo, that an examination and inquiry into this petitioner's rights and interest in the property and indebtedness sought to be recovered by the Alien Property Custodian be had; that it be directed that the said property so belonging to this respondent individually and in severalty be returned to this respondent or to his agent, Frederick Wesche and that your petitioner have such other and further relief as may be just.

CHARLES J. AHRENFELDT,
Petitioner,

By SELDEN BACON,
His Attorney in Fact.
SELDEN BACON,
Solicitor for Petitioner and Counsel.

Office & Post Office Address, No. 43 Exchange Place, Borough of Manhattan, New York City.
Office in New Jersey for service of papers, Fisk & Fisk, 15 Exchange Place, Jersey City, N. J.

146 STATE OF NEW YORK,
County of New York, ss:

Selden Bacon, being first duly sworn, deposes and says, that he is the solicitor for the above named Charles J. Ahrenfeldt and that the reason the foregoing petition is not verified by the said Charles J. Ahrenfeldt in person is that he is absent from the United States and in London, England, where he resides.

Deponent further says that he has read the foregoing petition and knows the contents thereof; that the matters therein stated are true to the best of his knowledge, information and belief; that the matters alleged are true of his own knowledge, save and except those matters therein stated to be alleged on information and belief, and that as to those matters they are in accordance with his information and he believes them to be true.

Deponent further says that the sources of his information and grounds for his belief are correspondence with the said Frederick Wesche and with Charles J. Ahrenfeldt named in the said petition; personal conversations with said Frederick Wesche and said Charles J. Ahrenfeldt; correspondence and personal conversations with R. Newton Crane, Esq., a barrister of the Middle Temple of London, England, English Counsel for said Charles J. Ahrenfeldt and Frederick Wesche, and copies of the accounts of said Wesche of said Trust Fund and of the accounts of the Commercial Trust
147 Company of New Jersey, both of said Checking Account and said Trust Account and statements made to this deponent by

the officers of said Commercial Trust Company of New Jersey and its Counsel, Mr. Anderson, also the petition of the Alien Property Custodian herein.

SELDEN BACON.

Subscribed and sworn to before me this 18th day of February, 1921.

[Notarial Seal.] O. V. W. HAWKINS,
Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co., No. 4.

148 *Proposed Answer of Charles J. Ahrenfeldt.*

In the District Court of the United States for the District of New Jersey.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, and CHARLES J. AHRENFELDT, Intervener, Respondents.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money in the Hands of the Respondent, Commercial Trust Company of New Jersey.

The answer of Charles J. Ahrenfeldt above-named intervener and respondent (interposed by leave of court first had and obtained) to the petition of the above-named petitioner.

This respondent, on information and belief says:

149 1.

This respondent is a citizen of the United States and is a resident of London, England, where his address is care of R. Newton Crane, 4 Temple Gardens, Temple. This respondent has resided in France, in Switzerland, or in England at all times since the first day of January, 1914, and has not since the first of January, 1914, resided in any judicial district of the United States, and has never been an enemy of the United States, and is not now.

2.

This respondent admits the allegations contained in paragraphs I and II of the petition of the above named petitioner herein.

3.

This respondent has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph III of the petition of the above named petitioner herein,

save and except only that this respondent is informed and believes that in the month of December, 1917 the above named Commercial Trust Company of New Jersey, not knowing the real facts beyond the securities and sums on deposit with it, and the contracts under which such deposits were made with it, made a report to the then Alien Property Custodian, which it made for the purpose of
150 safeguarding itself from liability to the United States of America, should it thereafter be determined upon competent evidence and proofs by competent authority that Helene von Schierholz in said petition named was an enemy and that such securities, or any part thereof, belonged to her, or said sums or any part thereof were owing to her. This respondent has no knowledge or information sufficient to form a belief whether Exhibit A of the said petition herein is a true and correct copy of the report so filed or whether the file number thereof is No. 8393 as alleged in the petition, but this respondent alleges on information and belief that such report so made was filed in the office of the Alien Property Custodian prior to March 1st, 1918 and was in the possession of the Alien Property Custodian long prior to the signature of the original paper of which Exhibit B of the said petition purports to be a copy, and that said report contained a copy of the agreement under which said securities and funds were deposited with said Commercial Trust Company, which agreement is substantially in the words shown in Schedule C of said Exhibit A of the petition, save that by subsequent agreement the rate of the Trust Company's compensation was on or about May 27th, 1913 reduced to 1 per cent. on the income. And that said Trust Company by such report asserted and informed the Alien Property Custodian that the said Commercial Trust Company was not a Trustee, but a bailee for hire of the securities and a mere banking depositary of the funds deposited with it, and that said Helene von Schierholz was not the sole owner of said
151 securities or said funds, nor were the same due to her, and that the same were not held by her or for her, or her sole behalf, or her sole account, or for her sole benefit, but that she had no more than a fractional interest therein, and that Frederick Wesche in said petition named was at least a co-owner thereof and also beneficially interested therein; and gave notice and presumptive evidence to said Custodian that said Frederick Wesche was not an enemy of the United States, and advised the said Custodian of the address it had for the said Wesche, through which address the said Wesche could readily have been reached, and inquiry as to the facts made of him.

This respondent admits and on information and belief alleges that said Commercial Trust Company of New Jersey did on December 19th, 1917 hold, deposited with it under and pursuant to the terms of the agreement set forth in Schedule C of Exhibit A of the petition herein, the securities described in Schedule E of Exhibit A of the Custodian's petition herein; and there had been deposited with said Trust Company by said Wesche under the terms of said agreement (save and except only that said agreement had been modified in writing on May 27th, 1913, by changing the rate of

compensation for the services of the said Trust Company from two per cent. to one per cent. on income alone and without any charge on the corpus of the estate), and there stood to the credit of said Checking Account in the joint names of said Wesche and
152 said Helene von Schierholz the sum of $4,700.08 due to said Wesche.

This respondent, on information and belief, denies each and every allegation contained in said Paragraph III of the said petition, save as hereinbefore expressly admitted and demands that the petitioner make due proof thereof.

4.

Answering paragraph IV of the petition of the above-named petitioner, this respondent admits and on information and belief alleges that the Commercial Trust Company had on March 28th, 1919, to the credit of the so-called Checking Account mentioned in said Paragraph IV, which account ran in the joint names of said Wesche and said Helene J. von Schierholz, a balance of $39,190.76 and to the credit of the so-called Trust Account therein mentioned a balance of $18,159.69. This defendant has no knowledge or information sufficient to form a belief as to the allegations in said paragraph IV of reports made to the petitioner by said Commercial Trust Company, and asks that the petitioner make due proof thereof.

This respondent denies on information and belief that the so-called Checking Account for $39,190.76 and the so-called Trust Account for $18,159.69 referred to in paragraph IV of the said petition were held in the manner therein alleged to have been reported by the respondent to the Alien Property Custodian or otherwise than as herein stated and set forth.

153 5.

This respondent, answering paragraph V of the petition herein, says he is informed and believes that on or about July 8th, 1918 there was delivered to the respondent Commercial Trust Company a paper of which Exhibit B of the petition purports to be a copy.

This respondent, on information and belief alleges that A. Mitchell Palmer did not, as Alien Property Custodin, either personally or otherwise, prior to the said delivery of said paper Exhibit B, or at any time, investigate or determine after investigation that the securities and monies mentioned in said Exhibit B of the petition, or any of them, were either owing to or belonging to or held for, by, on account of, or on behalf of, or for the benefit of Helene J. von Schierholz and alleges on information and belief that no investigation of the ownership or conditions of tenure thereof, or any thereof, aside from receiving such report from the Trust Company, was made or attempted by said Palmer as such Custodian, or on his behalf; and further alleges on information and belief that the information of the possession by the respondent Commercial

Trust Company of New Jersey of such funds and securities specified in the report made by it to the Alien Property Custodian in December 1917, as to which Exhibit B of the petition recites that such decision was made by said Palmer as such Alien Property Custodian after investigation, was derived solely from the report so made to him by said Commercial Trust Company of New Jersey, and such report itself contained and conveyed to said A. M. Palmer as
154 such Alien Property Custodian information and notice that said Frederick Wesche was both an owner and a holder at law and interested as a beneficiary in the securities held and moneys owed by the said Commercial Trust Company, described and mentioned in said report, and put said Palmer as such Custodian on inquiry as to the ownership of said securities and accounts, and the persons by and for whom and for whose account and benefit the same were held, and required of him investigation of the facts, especially through the sources of which said Trust Company so advised him.

This respondent further alleges on information and belief that neither said Palmer as such Alien Property Custodian, nor the petitioner, his successors, nor any of their respective subordinates, ever made any inquiry of said Wesche, or of any one representing him, or attempted to make any inquiry of him or of any one representing him, as to the rights of said Wesche, or of this respondent, in or to such funds and securities, or ever investigated, or attempted to investigate, the rights of said Wesche or of this respondent in said securities or funds or to ascertain any of the facts concerning the beneficial ownership of said securities, funds and indebtedness, all of which could have been readily ascertained by said Palmer had he inquired, as to the facts as to ownership and tenure of such property and indebtedness, of the said Wesche, whose Paris address had been so furnished to said Palmer as such Custodian. Said respondent Wesche had during the first week in August, as this re-
155 spondent is informed and believes, removed from Paris to Lucerne, Switzerland, and any inquiries addressed to said Wesche at the Paris address given in the report made to the Alien Property Custodian by the said Commercial Trust Company of New Jersey since the departure of said Wesche from Paris in 1914 have at all times been regularly and promptly forwarded to said Wesche at his Swiss address, and said Wesche's Swiss address was at all times after removing to Switzerland in August 1914 promptly furnished to any and all inquirers for him at his former Paris address. That so far as any pretended investigation was made or any information was secured by said Palmer as such Alien Property Custodian, either personally or officially, such information had disclosed to him prior to June 1, 1918, not only that the said Wesche was a person to whom said securities legally belonged, at least in part, and to whom said sums of money were legally owing by said Commercial Trust Company of New Jersey, and for whose benefit and account and in whose behalf they were held; but had also disclosed to said Custodian that said Frederick Wesche was at least in part the beneficial owner of said funds and securities and that said Helene von Schier-

holz was at most a beneficial owner of only a part thereof. That disregarding such information and without communication with said Wesche or this respondent or affording either of them any opportunity to be heard or to show their respective rights, and without inquiry or investigation, the said Alien Property Custodian secretly, without evidence to support his pretended conclu-
156 sion, and without making the investigation required by law, and contrary to the information he had in his possession and to the proofs and notice that were before him of the rights of said Wesche, and in fraud of the rights of this respondent and of said Wesche to neither of whom was any recourse to any court then afforded by the terms of the statute, (which then afforded such recourse only to persons resident in the various judicial districts of the United States) fraudulently pretended that he, said Palmer, had duly investigated, and that he had personally examined and passed on the evidence obtained by investigation, when he had not done either; and fraudulently pretended by his said letter, Exhibit B of the petition, to have determined after examination and investigation, (contrary to the evidence and information in his possession, and to the evidence immediately obtainable had he made real investigation, and contrary to the facts as they existed), that neither the said Wesche nor this respondent had any rights in such securities and monies, and that the same belonged exclusively to said Helene von Schierholz.

This respondent further alleges on information and belief that any such pretended determination by the said A. Mitchell Palmer, as Alien Property Custodian, as recited in said Exhibit B, that said securities belonged to Helene von Schierholz and that said sums of money were owing to her, was unlawful, fraudulent, null and void, and did not constitute due process of law, and was an attempt to deprive this respondent of his property without due process
157 of law, and to take his private property for public use without compensation or opportunity to be heard, contrary to the provisions of the Fourth and Fifth amendments to the Constitution of the United States; and was in excess of any powers that the Congress of the United States and the President of the United States could confer, even when legislating under the war powers of Congress, and also contrary to the provisions of the Act of Congress approved October 6, 1917 commonly known as the Trading with the Enemy Act and the amendments thereto theretofore adopted, and contrary to any authority conferred by the President of the United States on said Palmer as such Alien Property Custodian under said Act of October 6, 1917, and amendments thereto made prior to the making of such pretended determination.

6.

Answering the allegations of paragraph VI of the said petition herein this respondent, on information and belief, denies that either the sum of $39,190.76 designated as Checking Account or the sum of $18,159.69 designated as a Trust Account, or any part of either

thereof, was held by the respondent Trust Company subject to the demand of Helene J. von Schierholz, at any time or times after April 6, 1917 or under any other conditions or in any other way, at any time than as hereinafter alleged. And this respondent, on information and belief, alleges that the right and power of said Helene J. von Schierholz at any time to demand delivery to her of any of
158 said securities or monies was, from the making of such deposit, only a power in trust, as more fully hereinafter set forth, which ceased and determined on the declaration of war by the United States against Germany on April 6, 1917, and which power (save for the cash and securities individually belonging to her as hereinafter set forth) involved elements of personal trust and confidence and was not transferable.

This respondent admits and on information and belief alleges that Helene J. von Schierholz in the said petition named, who is this respondent's sister, was from and after the declaration of war by the United States, on Germany, technically an enemy of the United States, and until the enactment of the Act of Congress of June 5, 1920, without a license to deal with said properties, or any thereof, save such license as was given by proclamation in 1919. But this respondent alleges on information and belief that said Helene J. von Schierholz was born an American citizen on April 14th, 1856, in Paris, France, while her parents, who were then citizens of the United States domiciled in Brooklyn, New York, were temporarily residing in Paris; that said Helene J. von Schierholz is the daughter of this respondent's father, the late Charles Ahrenfeldt, of Kings County, New York, (who was by birth a subject of the King of Denmark, but was duly naturalized an American citizen on October 3, 1848, and domiciled and residing in the City, as it then was, of Brooklyn, New York, and retained his domicile there until his death on January 21st, 1893) and of Helene Ahrenfeldt, his wife, this respondent's mother, who was also an American citizen. That said Helene
159 J. von Schierholz lost her American citizenship and became a German subject by her marriage on or about July 24, 1879 and long prior to August 1st, 1914, to her husband Arthur von Schierholz, who was a German subject, but died in January 1899. That at the time of her said marriage said Helene J. von Schierholz was an American citizen. That such marriage occurred long prior to August 1st, 1914, and that said Helene J. von Schierholz has been since April 6, 1917, and is still, domiciled in Germany and there a resident.

Save and except as hereinbefore specifically admitted this respondent has no knowledge or information sufficient to form a belief as to the truth of any allegations contained in paragraph numbered VI of the said petition and therefore denies the same and each and every thereof and demands that the petitioner make due proof thereof.

7.

This respondent is informed and believes that the respondent Commercial Trust Company of New Jersey has failed and refused, and

continues to fail and refuse to convey, transfer, assign, deliver or pay to the petitioner the money or other property described in the petition, but still holds the same subject to the demand of said Frederick Wesche and the rights of this respondent. Save and except as hereinafter specifically admitted, this respondent, on information and belief, denies each and every allegation contained in paragraph numbered VII of the petition herein.

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8.

This respondent answering paragraph numbered VIII of the petition herein admits that this proceeding is brought by the petitioner as Alien Property Custodian of the United States.

9.

This respondent further alleges on information and belief that Frederick Wesche in the petition named was for many years prior to his said death a trusted business associate and friend of the late Charles Ahrenfeldt, of Brooklyn, New York, and that said Wesche is now well over sixty years of age, and that upon the death of the late Charles Ahrenfeldt above named, in 1893, as above set forth, his three children by his said wife Helene Ahrenfeldt, namely, this respondent, Helene von Schierholz (née Ahrenfeldt) named in the petition, and Lucy von Uxküll-Gyllenband (née Ahrenfeldt) derived and received from their said father's estate assets and securities of large value.

This respondent is, and by and since his birth has at all times been, an American citizen, and has at all times since August 1st, 1914 resided and been in either England, or in France or in Switzerland.

Said Lucy von Uxküll-Gyllenband was born a citizen of the United States on April 25th, 1861, while her said parents, Charles Ahrenfeldt and Helene Ahrenfeldt his wife were domiciled in Brooklyn, but temporarily residing in Paris, France, as above stated.

161 Said Lucy von Uxküll-Gyllenband lost her original American citizenship and became a German subject prior to 1897 by her marriage about 1885 to a German subject, one Hans von Wangenheim, from whom she thereafter obtained a valid decree of divorce in the German Courts prior to 1897, thereafter and in 1897 she was again married to Count Waldemar von Uxküll-Gyllenband also a German subject, and she has ever since resided in Germany, and is now there resident in the City of Berlin; and that at the time of her said marriage to said von Wangenheim said Lucy von Uxküll-Gyllenband was an American citizen.

10.

This respondent further alleges on information and belief that prior to January 30th, 1913, this respondent said Helene von Schierholz and said Lucy von Uxküll-Gyllenband, reposing trust and confidence in said Frederick Wesche, had respectively placed in his hands various sums of money and American securities belonging to

them respectively in severalty, all derived as aforesaid by them severally from this respondent's said father Charles Ahrenfeldt, deceased, and all situate in this country, the same to be cared for by said Wesche as the agent of this respondent, said Helene von Schierholz and said Lucy von Uxküll-Gyllenband respectively, with power to said Wesche to make investments and changes in investments thereof from time to time, with the approval of this respondent, and with the understanding that the said Wesche might likewise
162 along with such funds, invest other funds of his own, but that while the ownership of such securities and funds should at all times be kept several, the cash at any time on deposit should be carried in the name of said Wesche, though belonging to the said several persons in their respective proportions.

11.

This respondent further alleges on information and belief that in January, 1913 it was agreed by and between this respondent, said Helene J. von Schierholz, said Lucy von Uxküll-Gyllenband and said Frederick Wesche that certain securities and some cash then so held by said Wesche belonging in severalty to the respective parties, should be deposited by said Wesche in the above named Commercial Trust Company of New Jersey, and that for convenience in case of any supervening disability of said Wesche, such cash and securities should be so deposited in the joint names of said Wesche and of said Helene J. von Schierholz, with power (as between themselves and said Trust Company) to either of them to withdraw the same; but with the definite understanding and agreement among all said parties that said Helene J. von Schierholz should exercise such power only in case of disability of said Wesche, and then only subject to the like responsibility as such Wesche was at all times under, to return to any one of the respective owners his or her securities and his or her part of the cash, upon demand but leaving with said Wesche power and
163 authority in his own discretion at any time and from time to time to withdraw any and all securities or monies so deposited with the said Trust Company.

12.

This respondent further alleges, on information and belief, that all securities and cash so entrusted by Helene J. von Schierholz and said Lucy von Uxküll-Gyllenband respectively to said Frederick Wesche were property derived by them respectively from their said father Charles Ahrenfeldt, deceased, or his estate, or securities into which property so derived by them had been changed by them respectively; and none of said property so owned by them, or either of them, deposited in said Commercial Trust Company in the joint names of said Wesche and said Helene J. von Schierholz, was acquired by either of them, either directly or indirectly from any citizen or subject of Germany or Austro-Hungary, or of any country allied with either of those countries in the said War.

13.

This respondent further alleges on information and belief that pursuant to such arrangement between this respondent, said Frederick Wesche, said Helene J. von Schierholz and said Lucy von Uxküll-Gyllenband, in January, 1913 and thereafter, said Frederick Wesche and said Helene J. von Schierholz entered into the agreement
164 with said Commercial Trust Company of New Jersey set forth in Schedule C of Exhibit 1 of the petition herein, and thereafter, to wit, in May, 1913, by written agreement between them and said Commercial Trust Company said agreement was modified so as to provide that said Trust Company's commissions should be one per cent. on income alone, instead of two per cent. as originally provided.

14.

This respondent further alleges on information and belief that pursuant to such arrangements, on or about January 30, 1913, said Wesche deposited with said Commercial Trust Company of New Jersey, under said agreement with it, sundry American securities and cash belonging respectively to himself, to this respondent, to said Helene J. von Schierholz and to said Lucy von Uxküll-Gyllenband, all previously held by said Wesche under the above mentioned arrangements, part as the individual owner of certain thereof and part as such agent of this respondent and of said Helene J. von Schierholz and of said Lucy von Uxküll-Gyllenband respectively as several owners of individual sums and securities respectively.

Thereafter and pursuant to such power to change investments so reposed in said Wesche, and with the advice and approval of this respondent said Wesche changed various investments so held for the said several parties in interest, and some bonds held for them
165 respectively were paid off, and on December 19th, 1917 the cash and securities so deposited with said Commercial Trust Company of New Jersey under said agreement with it as so modified as hereinbefore alleged, consisted of a balance of $4,700.08 cash due from said Trust Company and the securities set forth in Schedule E of Exhibit 1 of the petition of the Alien Property Custodian herein.

Such cash balance due on December 19th, 1917, from the said Trust Company and securities then so deposited with it, of which it was a mere bailee, were then owned in severalty as follows:

1. By said Wesche individually:

Cash $1,074.23

$10,000 bonds of Vancouver Lumber Co. Ltd.
2,000 " " Kings County Lighting Co.
3,000 " " Adirondack Electric Power Co.
5,000 " " Hudson Navigation Co.
15,000 " " Champion Lumber Co.
5,000 " " New Netherlands Theatre Co.
5,000 " " Duluth Street Railway Co.
24,000 " " Central Georgia Power Co.
6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
9,800 United States bonds of the 2d Liberty Loan.

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2. By this respondent Charles J. Ahrenfeldt, individually.

Cash $303.73

$10,000 bonds of Vancouver Lumber Co. Ltd.
5,000 " " Hudson Navigation Co.
15,000 " " Champion Lumber Co.
5,000 " " New Netherlands Theatre Co.
5,000 " " Central Georgia Power Co.
5,000 " " Omaha Waterworks
8,000 United States bonds of the 2d Liberty Loan.

3. By said Helene J. von Schierholz:

Cash $1,164.71

5,000 bonds of Vancouver Lumber co. Ltd.
7,000 " " Tacoma Eastern R. R. Co.
28,000 " " City of Chicago
5,000 " " Montreal Tramways Co.
5,000 " " Gulf & Ship Island Railway
5,000 " " Kings County Lighting Co.
5,000 " " City of Memphis bearing 4¼% interest
7,000 " " Adirondack Electric Power Co.
5,000 " " Norfolk Southern R. R. Co.
5,000 " " Champion Lumber Co.
10,000 " " Jersey City (Water)
2,000 " " Clearview Coal Co.
5,000 " " Duluth Street Railway Co.
5,000 " " Central Georgia Power Co.
5,000 " " Westchester Lighting Co.

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42,000 Stock of the City of New York
16,500 United States bonds of the 2d Liberty Loan.

4. By said Lucy von Uxküll-Gyllenband individually.

Cash $2,157.41

$5,000 bonds of Vancouver Lumber Co. Ltd.
2,000 " " Tacoma Eastern R. R. Co.
5,000 " " Gulf & Ship Island R. R. Co.
3,000 " " Kings County Lighting Co.
11,000 " " City of Memphis bearing 4½% interest
5,000 " " Champion Lumber Co.
10,000 " " Jersey City (Water)
3,000 " " Clearview Coal Co.
6,000 " " Duluth Street Railway Co.
6,000 " " Central Georgia Power Co.
10,000 " " Los Angeles Water Works
5,000 " " Westchester Lighting Co.
83,000 Stock of the City of New York
5,000 Bonds of Omaha Water Works
18,700 United States bonds of the 2d Liberty Loan.

All said securities had been owned in severalty by the said several individuals as above set forth from a time prior to March 1st, 1914, save and except that:

1. Each of the said lots of Liberty Bonds had been bought with cash on hand, then on deposit in said Checking Account, belonging to the individual so acquiring such bonds on the 26th day of October, 1917.

168 2. Said Helene J. von Schierholz had acquired $2,000 of her Kings County Lighting bonds, $5,000 of her Adirondack Electric Power Company bonds and her $2,000 Clearview Coal Company bonds on or about March 7th, 1914, and long prior to August 1st, 1914, by purchase from this respondent for cash belonging to her.

3. Said Lucy von Uxküll-Gyllenband had acquired her $3,000 Kings County Lighting bonds, her $3,000 Clearview Coal Company bonds and her $6,000 Duluth Street Railway Co. bonds on or about March 6th, 1914, and prior to August 1st, 1914, by purchase from this respondent for cash belonging to her.

16.

This respondent further alleges on information and belief that thereafter and on the 3d day of January, 1918, said Vancouver Lumber Company bonds aggregating $30,000 were paid off, and various coupons belonging to said securities were collected aggregating (net) $3,104.89, and on December 28th, 1917, $11.42 interest accruing on the balances in the said account was credited on said account and on the 3d day of January, 1918, the securities so held by said Wesche individually and as such agent of the said several

persons and deposited with the Commercial Trust Company of New Jersey under said agreement in the said account, and all derived from the said sources, consisted of the following items belonging to the several parties respectively as follows:

169

1. Individual property of said Frederick Wesche.

Cash $11,497.59

$2,000 bonds of Kings County Lighting Company
3,000 " " Adirondack Electric Power Company
5,000 " " Hudson Navigation Company
15,000 " " Champion Lumber Company
5,000 " " New Netherlands Theatre Company
5,000 " " Duluth Street Railway Company
24,000 " " Central Georgia Power Company
6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
9,800 United States bonds of the 2d Liberty Loan.

2. Individual property of this respondent Charles J. Ahrenfeldt:

Cash $10,712.85

$5,000 Bonds of Hudson Navigation Company,
15,000 " " Champion Lumber Company
5,000 " " New Netherlands Theatre Company
5,000 " " Central Georgia Power Company
5,000 " " Omaha Water Works
8,000 United States bonds of the 2d Liberty Loan.

170

3. Individual property of Helene J. von Schierholz:

Cash $7,690.90

$7,000 bonds of Tacoma Eastern R. R. Company
28,000 " " the City of Chicago
5,000 " " " Montreal Tramways
5,000 " " " Gulf & Ship Island Railway
5,000 " " " Kinks County Lighting Company
5,000 " " " City of Memphis bearing 4¼% int.
7,000 " " " Adirondack Electric Power Co.
5,000 " " " Norfolk Southern R. R. Co.
5,000 " " " Champion Lumber Company
10,000 " " Jersey City (Water Works)
2,000 " " the Clearview Coal Company
5,000 " " Duluth Street Railway
5,000 " " Central Georgia Power Company
5,000 " " Westchester Lighting Company
42,000 Stock of the City of New York
16,500 United States bonds of the 2d Liberty Loan.

171 4. Individual property of Lucy von Uxküll-Gyllenband:

Cash $7,915.05

$2,000 bonds of Tacoma Eastern R. R. Co.
$5,000 " " Gulf & Ship Island R. R. Co.
$3,000 " " Kings County Lighting Company.
$5,000 " " Champion Lumber Company.
$11,000 " " City of Memphis bearing 4½% interest.
$10,000 " " Jersey City (Water).
$3,000 " " the Clearview Coal Company.
$6,000 " " the Duluth Street Railway Co.
$6,000 " " Central Georgia Power Company.
$10,000 " " Los Angeles Water Works.
$5,000 " " Westchester Lighting Company.
$83,000 stock of the City of New York.
$5,000 bonds of Omaha Water Works.
$18,000 United States bonds of the 2d Liberty Loan.

17.

This respondent further alleges on information and belief that subsequently under said authority conferred on said Frederick Wesche with the approval of this respondent the Champion Lumber bonds above mentioned were exchanged on behalf of each of the said several owners thereof for a like amount of bonds
172 of the Suncrest Lumber Company, which had taken over the business of said Champion Lumber Company.

18.

This respondent further alleges on information and belief that the various balances due from the Trust Company on the Checking Account were so far as its relations were concerned a debt due from said Trust Company; but as between this respondent, said Wesche, said Helene J. von Schierholz and said Lucy von Uxküll-Gyllenband the sums deposited with said Trust Company constituted a fund in which they were severally and individually interested in the amounts herein shown. For convenience the sums deposited with the Trust Company are at times herein referred to as a fund. Said Trust Account has from its inception all been set aside and is held by said Commercial Trust Company as a separate fund.

19.

This respondent alleges on information and belief that out of the cash on hand on January 3rd, 1918, above shown, which was all held in the Checking Account mentioned in the petition, there was paid out on March 26th, 1918, the sum of $42.60, of which $37.18 was money of said Frederick Wesche, $2.21 was money of this respondent, $1.60 was money of the said Helene J. von Schierholz, and $1.61 was money of the said Lucy von Uxküll-Gyllenband.

173 The only other changes in the said Checking Account from and after January 3rd, 1918, were additions of interest accrued on the balances in the account, which belonged severally to the individual owners of the funds on deposit as earned thereby, and such individual shares of interest earned, up to September 28th, 1920, were as follows:

To said Frederick Wesche, individually	$978.05
To this respondent individually	913.81
To Helene J. von Schierholz individually	656.01
To Lucy von Uxküll-Gyllenband individually	675.15
Total	$3,223.02

20.

This respondent further alleges that the total amount of cash in said Checking Account on March 28th, 1919 was $39,190.76 which belonged:

To said Frederick Wesche individually	$11,890.48
To this respondent individually	11,112.36
To Helene J. von Schierholz individually	$7,977.67
To Lucy von Uxküll-Gyllenband individually	8,210.25
	$39,190.76

174 21.

This respondent further alleges on information and belief that additional interest was earned on the balances in said checking account and credited thereon after March 28th, 1919 and up to and including September 28th, 1920, aggregating $1,806.05, bringing the balance to the credit of said Checking Account on that date up to $40,996.81, which entire sum belongs:

To said Frederick Wesche individually	$12,438.46
To this respondent individually	11,624.45
To Helene J. von Schierholz individually	8,345.31
To Lucy von Uxküll-Gyllenband individually	8,588.59
	$40,996.81

22.

This respondent further alleges that since September 28th, 1920 said balance in the so-called Checking Account has been and is now earning additional interest, which additional interest as earned belongs to said Frederick Wesche, to this respondent, to said Helene J. von Schierholz and to said Lucy von Uxküll-Gyllenband in proportion to their said several interests therein on September 28th, 1920.

175 23.

This respondent further alleges on information and belief that the so-called Trust Account referred to in the petition, was created after January 3d, 1918, and consists exclusively of sums collected by said Commercial Trust Company since February 1st, 1918 as interest on the said several securities so deposited with it as above set forth, owned by the said several persons, and of the sums collected as principal of said $5,000 Clearview Coal Company bonds on April 7th, 1920, and as principal of said $10,000. New Netherlands Theatre Company bonds on May 3d, 1920, and of interest accrued on the balances so placed to the credit of said account, less the commissions charged by said Trust Company under said agreements with it.

24.

This respondent further alleges on information and belief that all sums so deposited to the credit of said so-called Trust Account belonged individually to one or other of said four persons, to-wit, this respondent, said Frederick Wesche, said Helene J. von Schierholz and said Lucy von Uxküll-Gyllenband in severalty, in accordance with their respective ownership of the securities from which the said several sums were derived.

25.

176 This respondent further alleges on information and belief that on March 28th, 1919 the sums credited to said Trust Account, above all commissions charged thereon, amounted to the aggregate sum of $18,159.69, which sum belonged to the said four persons respectively in severalty as follows:

To said Frederick Wesche individually:

Coupons and interest from his said securities.....	$3,093.01
Interest accrued on such deposit thereof.....	37.29
	$3,130.30

To this respondent Charles J. Ahrenfeldt; individually:

Coupons and interest from his said securities.....	$1,539.46
Interest accrued on such deposit thereof.....	17.88
	$1,557.34

To said Helene J. von Schierholz individually:

Coupons and interest from her said securities.....	$6,566.81
Interest accrued on such deposit thereof.....	67.62
	$6,634.43

177 To said Lucy von Uxküll-Gyllenband individually:

Coupons and interest from her said securities.....	$6,760.56
Interest accrued on such deposit thereof.....	77.06
	$6,837.62

26.

This respondent further alleges on information and belief that on October 1st, 1920 the sums credited to said Trust Account, above all commissions so charged thereon, amounted to the aggregate sum of $61,583.83, which sum belonged to the said four persons respectively in severalty, as follows:

To said Frederick Wesche individually	$12,924.99
To this respondent individually	8,862.16
To Helene J. von Schierholz individually	19,073.99
To Lucy von Uxküll-Gyllenband individually	20,732.69
Total	$61,583.83

That by a book-keeper's error said Commercial Trust Company made an overcharge of $1.00 commissions on October 1st, 1920 on credits amounting to $907.15, charging $10.07 commissions
178 instead of but $9.07, and the balance disclosed by it as of October 1st, 1920 in its answer is $1.00 less than the actual balance.

27.

This respondent further alleges on information and belief that of the net sums so credited to said Trust Account so belonging to this respondent (deducting its said erroneous charge of $1.00) the following were the sources, all being derived from his above-mentioned securities:

Principal of $5,000. New Netherlands Theatre bonds belonging individually to this respondent	$5,000.
Amounts of interest or coupons collected on the individual securities above described belonging to this respondent individually, so deposited with said Commercial Trust Company of New Jersey (less commissions of 1%)	3,639.53
Amounts of interest credited growing out of the above amounts credited to said account belonging to this respondent individually (less commissions of 1%)	222.63
	$8,862.16

28.

This respondent further alleges on information and belief that in addition to said sums additional coupons are being collected
179 from time to time and credited to said Trust Account belonging to said four several individuals, cut from their said respective securities, which belong to them respectively in severalty, and additional interest is being earned on their several balances deposited in said account, all of which belong to them severally.

29.

This respondent further alleges on information and belief that the securities still in the hands of said Commercial Trust Company of New Jersey so deposited with it now consist of the following securities owned severally by the following individuals respectively:

1. Securities owned by said Frederick Wesche individually:

$2,000 bonds of Kings County Lighting Company.
3,000 " " Adirondack Electric Power Company.
5,000 " " Hudson Navigation Company.
15,000 " " Suncrest Lumber Company.
5,000 " " Duluth Street Railway.
24,000 " " Central Georgia Power Company.
6,000 " " Fonda, Johnstown & Gloversville R. R. Co.
9,800 United States bonds (2d Liberty Loan).

180 2. Securities owned by this respondent Charles J. Ahrenfeldt, individually:

$5,000 bonds of Hudson Navigation Company.
15,000 " " Suncrest Lumber Company.
5,000 " " Central Georgia Power Company.
5,000 " " Omaha (Water Works).
8,000 United States bonds (2d Liberty Loan).

3. Securities owned by said Helene J. von Schierholz individually:

$7,000 bonds of Tacoma Eastern R. R. Co.
28,000 " " City of Chicago (City Hall 4s).
5,000 " " Montreal Tramways.
5,000 " " Gulf & Ship Island Ry. Co.
5,000 " " Kings County Lighting Co.
5,000 " " the City of Memphis (4¼%).
7,000 " " " Adirondack Electric Power Company.
5,000 " " " Norfolk Southern R. R. Co.
5,000 " " " Suncrest Lumber Company.
10,000 " " Jersey City, Water Works.
5,000 " " the Duluth Street Railway.
5,000 " " " Georgia Central Power Co.
5,000 " " " Westchester Lighting Company.
42,000 stock of the City of New York.
16,500 United States bonds 2d Liberty Loan).

181 4. Securities owned by said Lucy von Uxküll-Gyllenband individually:

$2,000 bonds of Tacoma Eastern R. R. Co.
5,000 " " Gulf & Ship Island Ry.
3,000 " " Kings County Lighting Co.
11,000 " " the City of Memphis (4½%).
5,000 " " Suncrest Lumber Company.
10,000 " " Jersey City—Water Works.
6,000 " " Duluth Street Railway.
6,000 " " Central Georgia Power Company.
10,000 " " City of Lost Angeles (Water Works).
5,000 " " Westchester Lighting Company.
83,000 stock of the City of New York.
5,000 bonds of Omana (Water Works).
18,700 United States bonds (2d Liberty Loan).

Such securities so owned are in each instance accompanied by all coupons thereto belonging maturing since October 1st, 1920 (save as any such coupons have been collected since October 1st, 1920 and thereafter credited to said Trust Account) and the coupons and any proceeds so collected and any interest accruing thereon are the several property of said several owners of the securities to which they pertain. All the said several securities herein mentioned other than the said United States bonds are securities issued by various American, private or municipal corporations.

182 30.

This respondent further alleges on information and belief that the above-named securities and the above described indebtedness and sums of cash so set apart, consisting of $5,000 bonds of the Hudson Navigation Company, $5,000 bonds of the Suncrest Lumber Company, $5,000 bonds of the Central Georgia Power Company, $5,000 bonds of the Water Works of the City of Omaha and $8,000 United States bonds, and the sums of $11,624.45 and $8,862.16 are the individual several property of this respondent and are part of the identical securities, indebtedness and particular funds of cash which the Alien Property Custodian, as petitioner herein, is asking to have directed turned over to him by order and decree of this Court upon his petition herein.

31.

This respondent further alleges on information and belief that said Frederick Wesche was at all times, and still is the agent of this respondent and of said Helene J. von Schierholz and of said Lucy von Uxküll-Gyllenband, in charge of their said respective securities and monies, and holder of his own, and this relation was not changed by the arrangement for deposit of said securities and cash in the joint names of said Wesche and said Helene J. von Schierholz any

further than this: that she would be able to act as an alternate for said Wesche in withdrawing such securities and cash in
183 the event of the death or other disability of said Wesche. That it was a term of the arrangement between said Wesche, this respondent, said Helene J. von Schierholz and said Lucy von Uxküll-Gyllenband for such deposit in the joint names of said Wesche and said Helene J. von Schierholz with the Commercial Trust Company of New Jersey that the said Helene J. Von Schierholz should act only as such alternate in such event, and she was given such power only upon that trust. That said Helene J. von Schierholz has at all times observed said trust and has not at any time from the inception of such deposit in January, 1913, interfered in any way with the conduct of such agency by said Wesche, who has at all times been the sole person actually in charge of said securities and funds.

32.

This respondent further alleges, on information and belief, that the attempt of the Alien Property Custodian to seize such funds, under the power conferred upon said Helene J. von Schierholz by the making of the deposit in the joint names of said Wesche and said Helene J. von Schierholz, is contrary to the terms of the arrangement under which she was so appointed, and such deposits with the Trust Company were made by said Wesche, that she should act only as such alternate, and only in the event of the death or disability of the said Wesche, and such attempt of the Alien Property Custodian is in breach of the trust duties and relations imposed on said Helene J. von Schierholz by her said arrangement, to all
184 of which the Custodian would if he could have taken over her said power, have ipso facto been subject. That said Wesche has not at any time been under any disability to act, and neither the time nor the occasion when said Helene J. von Schierholz would be justified in withdrawing any of said cash or securities by virtue of the deposit in the joint names of said Wesche and herself has ever arisen. And that the attempt of the Custodian to obtain such funds and securities by virtue of her being so named as joint depositor and the provisions of the agreement with said Commercial Trust Company, if he had the power to exercise the power held by said Helene J. von Schierholz, was a breach of the trust duties assumed by her (upon the assumption of which alone she was named as such joint depositor on the terms stated in such contracts with the said Commercial Trust Company), and in fraud of the rights of this respondent.

33.

This respondent further alleges on information and belief that all the foregoing facts relating to the ownership of said property, would have been promptly and fully disclosed to the said A. Mitchell Palmer as Alien Property Custodian, or his representatives, had they or any them either in 1918 or at any other time made due inquiry

or investigation into the rights to the said funds and securities so deposited with the Commercial Trust Company, and the sums
185 on deposit with it, or the ownership and tenure thereof; that none of them made any investigation whatever into the ownership or tenure or conditions thereof beyond seeking and obtaining such report from said Commercial Trust Company.

34.

This respondent further alleges that long prior to the commencement of this proceeding and after the enactment of the Act of Congress of June 5th, 1920, to wit on the 1st day of July, 1920, said Frederick Wesche demanded of the said Commercial Trust Company payment to him of all of said balances in the said checking account and said Trust Account so agreed to be paid to him on his demand, and all said securities so deposited with it. That said demand was made in good faith and without any collusion with the said respondent Trust Company. That in making such demand said Frederick Wesche acted as owner of his own part and as such trust agent for this respondent as well as such trust agent for Helene J. von Schierholz and for said Lucy von Uxküll-Gyllenband, charged by them respectively with the duty of holding their said respective securities and cash.

35.

This respondent further alleges on information and belief that said Commercial Trust Company of New Jersey holds all said funds and securities so belonging to this respondent and owes the moneys so belonging to this respondent hereinbefore set forth as
186 bailee, depositary and debtor of said Frederick Wesche as agent of this respondent and that this respondent is entitled to intervene and be heard in this proceeding pro interesse suo as such individual owner of the cash and securities and individual creditor for the said amounts; and that any order or decree of this Court directing any disposition of such funds or securities so belonging to this respondent, without first giving him his day in court will be contrary to law and to the provisions of the Fourth and Fifth amendments to the Constitution of the United States.

36.

This respondent further alleges on information and belief that no investigation and no determination after investigation of the ownership or holding of the securities and moneys in the hands of the Commercial Trust Company of New Jersey hereinbefore described, such as was contemplated by the provisions of the Trading with the Enemy Act has ever been made by either the former Alien Property Custodian or the present Alien Property Custodian, or any representative of either, and that the present proceeding is an attempt simply to ignore the rights and interests of this respondent to take the private property of this respondent for public use, without just compensa-

tion, and to deprive him of his property without due process of law and in violation of the right of this respondent to be secure in his effects against unreasonable seizure, guaranteed by the Fourth Article of Amendment to the Constitution of the United States,
187 and also without warrant issued upon proper cause supported by oath or affirmation and particularly describing the things to be seized. And this respondent calls particular attention to the fact that the Alien Property Custodian in his petition herein, while sedulously alleging that the said A. Mitchell Palmer did investigate and after investigation determine that said Helene J. von Schierholz was in 1918 an enemy of the United States, has wholly, and apparently sedulously avoided alleging that either said Palmer as such Alien Property Custodian or said petitioner, his successor, has ever investigated or determined after investigation that the indebtedness of the Trust Company and the property mentioned in Exhibit A of said Custodian's petition, was by the Trust Company owing to, or belonged to, or was held for, by, on account of, or for the benefit of said Helene von Schierholz.

37.

This respondent on information and belief alleges that Ernest T. Greiner named in the answer of the said Commercial Trust Company of New Jersey to the petition herein was at one time an employee of said Frederick Wesche; that said Greiner is not now and has not been so employed at any time by said Wesche for more than six months last past; that said Greiner has neither lien nor color of lien on any of the said funds or securities so in the hands of said Commercial Trust Company, and this respondent prays that if said Greiner be allowed to intervene or answer herein this respondent be permitted to answer any claim said Greiner may make to any
188 of the funds or securities belonging to this respondent, or any matters that he may assert concerning the same.

Wherefore this respondent prays that an examination pro interesse suro into his rights and interests in the property and indebtedness petitioned for by the Custodian be had and the rights and interests of this respondent therein be determined; that the prayer of the petition be denied; that the said Commercial Trust Company of New Jersey be ordered and directed to deliver to this respondent or to his agent Frederick Wesche all the securities and funds so held by it above shown to be the individual property of this respondent and that this respondent have such other and further relief in the premises as may be just.

CHARLES J. AHRENFELDT,
By SELDEN BACON,
His Attorney in Fact.
SELDEN BACON,
Solicitor for Petitioner & Counsel.

No. 43 Exchange Place, Borough of Manhattan, New York City.

Office in the District of New Jersey at which papers can be served, Fisk & Fisk, Esqs., 15 Exchange Place, Jersey City, New Jersey.

189 STATE OF NEW YORK,
County of New York, ss:

Selden Bacon, being duly sworn, deposes and says that he is the solicitor for the above named Charles J. Ahrenfeldt and his agent in this country.

Deponent further says that the reason the foregoing answer is not verified by said Charles J. Ahrenfeldt personally is because he is absent from the United States and in England where he resides.

Deponent further says that he has read the foregoing answer and knows the contents thereof; that the matters therein stated are true to the best of his knowledge, information and belief; that the matters alleged are true of his own knowledge, save and except those matters therein stated to be alleged on information and belief, and that as to those matters they are in accordance with his information and he believes them to be true.

Deponent further says that the sources of his information and grounds of his belief are correspondence with the said Frederick Wesche and with Charles J. Ahrenfeldt; personal conversations with said Frederick Wesche and said Charles J. Ahrenfeldt; correspondence and personal conversations with R. Newton Crane, Esq., a barrister of the Middle Temple of London, England, English Counsel for said Charles J. Ahrenfeldt and Frederick Wesche, and
190 copies of the accounts of the Commercial Trust Company of New Jersey, both of said Checking Account and said Trust Account, and statements made to this deponent by the officers of said Commercial Trust Company of New Jersey and its counsel, Mr. Anderson, also the petition of the Alien Property Custodian herein.

SELDEN BACON.

Subscribed and sworn to before me this 18th day of February, 1921.

O. V. W. HAWKINS, [SEAL.]
Notary Public, Nassau Co., New York.

Certificate filed in N. Y. Co. No. 4.
N. Y. Co. Register's No. 2002.

(Endorsed:) Filed Oct. 22, 1921, at 9 o'clock A. M. George T. Cranmer, Clerk.

191 *Statement of the Evidence and Proceedings at the Hearing.*

District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of THOMAS W. MILLER, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thurigen, Germany, an Enemy.

Statement of all Evidence and Proceedings at the Hearing of the Cause.

The above entitled matter came on to be heard at a Stated Term of this Court held, Hon. John Rellstab, District Judge presiding, without a jury, on the 21st day of February, 1921, regularly in its order upon the calendar, upon the petition of the Alien
192 Property Custodian filed September 11th, 1920, and the rule to show cause thereto annexed and the amended answer to said petition of the Commercial Trust Company, filed and served by leave of Court first had and obtained.

Elmer H. Geran, Esq. and D. H. Stanley, Esq. (of Counsel) appearing for the petitioner the Alien Property Custodian.

Fisk and Fisk, and Selden Bacon and J. Fisher Anderson, Esqs. (of Counsel), appearing for the respondent the Commercial Trust Company of New Jersey.

And thereupon the following proceedings were had:

Frederick Wesche, by Selden Bacon, Esq., his solicitor and counsel, presented his petition for leave to intervene and his proposed answer to the petition of the Alien Property Custodian, and moved for leave to interevene in the proceeding and file his proposed answer.

Charles J. Ahrenfeldt, by Selden Bacon, Esq., his solicitor and counsel, presented his petition for leave to intervene and his proposed answer to the petition of the Alien Property Custodian, and moved for leave to interevene in the proceeding and file his proposed answer.

Counsel for the Alien Property Custodian opposed each of such motions and the Court took the same under advisement.

The Alien Property Custodian, petitioner, thereupon introduced in evidence and submitted to the Court the original certificate made by the respondent of date the 19th day of December, 1917, of
193 which a true and correct copy is annexed to the original petition herein, and also a letter from the respondent (by its

Secretary and Treasurer) to the Alien Property Custodian of date the 4th day of June, 1918, which letter it was conceded by both parties was sent to the then Alien Property Custodian on behalf of the respondent at the time it bears date, and received by said Custodian in due course of mail, which letter read as follows:

"Jersey City, N. J., June 4th, 1918.

"Alien Property Custodian,
Washington, D. C.

DEAR SIR:

"We acknowledge receipt of your letter of May 10th, 1918, in the matter of Helene J. von Schierholz, enclosing original and duplicate of demand upon us for securities and money reported to your Department.

"We regret that upon the advice of counsel, we are unable to acknowledge service of this demand or to surrender to you the securities or moneys constituting the fund reported. Our reason for refusing to acknowledge your jurisdiction over this fund is that the securities and money constituting the fund are held under an agreement dated June 30th, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. von Schierholz, of Plaue, Thuringen, Germany, under which agreement certain securities were deposited to be held for the joint account of the said Frederick Wesche and
194 Helene J. von Schierholz, the interest to become due and payable on said securities to be collected for the joint account of Wesche and von Schierholz and the securities to be delivered when requested to Wesche and von Schierholz or to the survivor.

"Under this deposit agreement Frederick Wesche is entitled, if he makes demand for the same, to the securities and income constituting the trust fund. So far as we know Frederick Wesche is a resident of Paris, France, and not an alien enemy or ally of enemy.

"We have been advised that under these circumstances we would not be legally justified in surrendering these securities and money to you, pursuant to your demand, and that if we did so, we would be subject to action for damages by Wesche for delivering his property.

"We are desirous at all times of doing everything to assist the Government in the segregation of the property of alien enemies, and it is only because of the terms of the agreement under which these securities are held that we refuse to deliver the same.

"We think that if you do not concur in the correctness of our position in this matter you should institute action to test the correctness of the same.

"Report was made of the trust fund above mentioned, even though Wesche is not an alien enemy so far as we know, simply because of the fact that we know Helene J. von Schierholz to be an alien
195 enemy, and for the purpose of protecting our Company against liability for not making such report.

"Enclosed find a copy of the agreement under which we hold the securities and money which you desire us to deliver.

"Yours very truly,

"J. S. PERKINS,
"Sec'y & Treas."

Aside from the submission of said two papers the petitioner introduced no further evidence and rested; and the following colloquy thereupon occurred between the Court and counsel for the respective parties:

"Mr. Bacon: If there is any question about the facts that are set up in the return we want to take testimony and prove it. I don't understand whether counsel takes issue with the statements there made.

The Court: You want to look over that carefully because if I cannot treat this as a pure legal issue you will have to take your testimony.

Mr. Stanley: As far as we are concerned it is to be treated as a pure legal issue.

Mr. Bacon: That is you demur to the answer.

Mr. Stanley: We demur to the answer. You say there was not an investigation; we say there was. I have introduced the trust
196 agreement and the report and the letter of the Commercial Trust Company, and I want to say——

The Court: You know what they have introduced here.

Mr. Bacon: Yes, sir; I don't dispute the existence of those papers. Do you dispute our allegation there was no inquiry made of Mr. Wesche?

Mr. Stanley: I do of Mr. Wesche—oh, as far as Wesche is concerned that has nothing to do with our contention.

The Court: What he wants to know is whether you dispute it.

Mr. Stanley: We don't dispute——

The Court: You say as a matter of law.

Mr. Stanley: He has no bearing on it whatsoever. We will admit Mr. Wesche was not an enemy. We never said he was otherwise.

Mr. Bacon: Practically then except for the proposition as far as you have shown you don't claim there was any further investigation.

Mr. Stanley: No.

The Court: Is this to be transcribed?

Mr. Bacon: I think so.

Mr. Bacon: May I have this settled. As I understand it, the Government does not claim that there was any investigation or determination beyond what is shown by the papers.

Mr. Stanley: Beyond what is shown by the papers and this letter.

The Court: That is in here, isn't it?

197 Mr. Stanley: Yes.

Mr. Bacon: Now, and that except for that, and we don't dispute that that amount was done, and except for that you simply demur to the answer, to the return.

The Court: Do you want a demurrer or do you move to strike out?

Mr. Stanley: Move to strike out.

The Court: You contend, don't you, he has not raised anything at all in the answer?

Mr. Stanley: He says there was no investigation as to anybody. We say there was an investigation as to Von Schierholz. We don't care anything about Wesche. We never made any investigation as to Wesche and never questioned the fact he was not an enemy. I don't see where it comes in in our case at all.

The Court: The only thing is you come in here with a petition and ask for a rule upon them to show cause why this property should not be turned over. If there is anything you think is in issue as a fact you are presumed now to have joined issue on that, and the only thing you have done is to support your contentions as to that issue by the introduction of these two or three documents.

Mr. Stanley: Yes.

The Court: As to the rest you say it is not in issue, so they are presenting an issue which is not in the larger issue.

Mr. Stanley: That is exactly our situation.

198 The Court: You don't combat or want to combat what they have put in evidence.

Mr. Bacon: I don't dispute the facts.

The Court: That the legal effect of that does not mean anything?

Mr. Bacon: Yes, sir. That does not meet our denials but if there is any question of fact beyond that we claim the right to present evidence.

The Court: You must determine whether you want to put in anything.

Mr. Bacon: He has not taken issue with us on the other matters. Unless it is specifically admitted here there was no further investigation, nothing further than what is shown there——

The Court: I don't want to control counsel.

Upon filing of these amended answers, the two answers standing, everything that you have not contraverted by the introduction of these documents you admit to be facts but you contend upon these facts there is no legal answer to your claim.

Mr. Stanley: That is it.

The Court: So that everything you put in your answer except what may be controverted by these documents is admitted as facts in the case.

Mr. Bacon: All right, sir.

The Court: That is where you stand.

Mr. Stanley: Yes, sir."

199 The Commercial Trust Company thereupon rested; and after argument the matter was submitted on such motions and such papers and facts.

The Court thereupon fixed a day for the filing of briefs by the petitioner and respondent, which were duly submitted, to wit, on the 15th day of March 1921.

Thereafter, and on the 22nd day of October, 1921, the Court filed its opinion on the applications for leave to intervene, and its opinion

on the application of the Alien Property Custodian under his said Rule to Show Cause.

Thereafter, at a Stated Term of the Court, on the 16th day of January, 1922, Hon. John Rellstab presiding without a jury, the matter came on for further hearing on suggestion of the succession in office of Thomas W. Miller to the original petitioner Francis P. Garvan as Alien Property Custodian, and upon application of the said Miller for final decrees, on said several applications, of the Custodian and of the petitioners for intervention.

Frederick M. P. Pearse, Esq., appearing for the Custodian.

Selden Bacon, Esq., appearing as counsel for the Commercial Trust Company, and as solicitor and counsel for Messrs. Wesche and Ahrenfeldt.

Over the objection of the respondent and of the petitioners for intervention that by reason of the termination of the war the jurisdiction of the Court in this proceeding had terminated, the suggestion of the succession of Mr. Miller not being controverted, order was
200 entered substituting said Thomas W. Miller as Alien Property Custodian in place and stead of Francis P. Garvan as Alien Property Custodian.

It was then urged by Counsel for the Commercial Trust Company and for the petitioners for intervention that the adoption of the joint Peace Resolution of July 2nd, 1921, by both Houses of Congress and its signature by the President and filing with the Secretary of State, and the making and ratification of the treaty with Germany of August 25th, 1921 and exchange of ratifications thereof had and the passage of the Act of Congress of February 27th, 1921, altered the situation since the original hearing and since the filing of the Court's opinions, and that the Custodian was no longer entitled to the relief sought by him, whatever his previous rights had been.

The Court overruled all objections. It then signed the order denying the motion of the Alien Property Custodian to strike out the amended answer of the Commercial Trust Company, and thereupon entered its several orders and decrees, as follows:

On January 16th, 1922, its order and decree denying the petition of said Wesche for leave to intervene, and its order and decree denying the petition of said Ahrenfeldt for leave to intervene, as more fully thereby appears;

On January 19th, 1922, its final decree granting the petition of the Alien Property Custodian for relief as prayed for by the Alien
201 Property Custodian against said Commercial Trust Company (except as to changes in securities and amounts of money in the possession of said Trust Company as shown by its said amended answer), as more fully appears by said decree.

The foregoing is hereby settled by me as a full statement of all the evidence introduced and proceedings had at the hearing of this case.

JOHN RELLSTAB,
District Judge.

(Endorsed:) Filed Jan. 27, 1922 at 9 o'clock A. M. George T. Cranmer, Clerk. Service acknowledged Jan. 25, 1922. Elmer H. Geran, U. S. Atty.

202 *Opinion of Rellstab, J., on Petitions to Intervene.*

United States District Court, District of New Jersey.

In Equity.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Respondent.

On Petition of Frederick Wesche and Charles J. Ahrenfeldt for Leave to Intervene.

Denied.

Selden Bacon, for Frederick Wesche and Charles J. Ahrenfeldt.
Elmer H. Geran (United States Attorney), Lucien H. Boggs and Dean Hill Stanley (Special Assistants to the Attorney General), for Respondent.

Memorandum.

RELLSTAB, *District Judge:*

At the time of the hearing of the rule to show cause granted in the above-entitled suit, Charles J. Ahrenfeldt and Frederick Wesche, the latter named with Helene J. von Schierholz in the trust agreement involved in such proceeding, presented their petitions for leave to intervene in said cause, praiyng on examination pro interesse suo to ascertain the interests and rights of each of them in the
203 property covered by said agreement. Ahrenfeldt alleged that he was a separate and individual owner of a large part of said property. Wesche alleged that he was bailor and principal of the Commercial Trust Company, defendant herein; a separate beneficial owner of a large part of the securities and moneys held by said Trust Company under said agreement; and agent charged with the custody of said properties of his several principals, the said Charles J. Ahrenfeldt and Helene J. von Schierholz, and also of one Lucy von Uxküll Gyllenband. In the decision of the main case (opinion filed this day) it is held that under said trust agreement either Mrs. von Schierholz or Wesche could demand the possession of the properties therein covered and that inasmuch as Mrs. von Schierholz was an enemy within the meaning and purpose of the Trading with the Enemy Act, it was the duty of the Trust Company to comply with the demands of the Alien Property Custodian and turn over such property to him, and that the questior of other

persons' ownership or interest in said properties was irrelevant in such possessory proceedings.

The questions sought to be litigated by Wesche and Ahrenfeldt can be raised only after the demands of the Alien Property Custodian have been complied with, and by instituting the proceedings authorized by section 9 of the Act, as amended June 5, 1920. Their petitions to intervene in the present proceedings are denied.

(Endorsed:) Filed Oct. 22, 1921, at 9 o'clock A. M. George T. Cranmer, Clerk.

204 *Opinion of Rellstab, J., on Final Hearing.*

United States District Court, District of New Jersey.

In Equity.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

v.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Respondent.

On Petition, etc., on Rule to Show Cause Why Certain Moneys and Securities Should Not Be Turned Over to the Alien Property Custodian.

Rule Made Absolute.

Elmer H. Geran (United States Attorney), Lucien H. Boggs and Dean Hill Stanley (Special Assistants to the Attorney General), for Petitioner.

Fisk & Fisk (Selden Bacon and J. Fisher Anderson of counsel), for Respondent.

Opinion.

RELLSTAB, *District Judge:*

This is a suit to enforce demands made by the Alien Property Custodian under the Trading with the Enemy Act (Oct. 6, 1917, 40 Stat. 411), for delivery to him of certain securities and
205 moneys held by the Commercial Trust Company of New Jersey as trustee and for the joint account of Helene J. von Schierholz and Frederick Wesche, the former having been determined to be an enemy not holding a license from the President.

In the Custodian's petition it is alleged, inter alia, that: on or about December 19, 1917, the Trust Company, acting in compliance with the terms of the Trading with the Enemy Act and the Executive Orders issued thereunder, reported in writing to the Custodian's predecessor in office that it held in trust certain specified securities and cash for the joint account of Frederick Wesche of France and Helene J. von Schierholz of Germany, under a certain agreement, which reads:

"Received, Jersey City, January 30, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plaue, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed, and having a par value of five hundred and twenty-four thousand dollars ($524,000) to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them, it being understood that the said bonds and the said interest money
206 to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2% of the amount so collected; this receipt is executed in triplicate.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. W. HARDENBERGH,
President.

Attest:
[SEAL.] WM. J. FIELD,
Secretary.

"The deposit of the bonds with the Commercial Trust Company of New Jersey and the terms upon which said Trust Company is to hold and deliver over the said bonds and to collect and pay over the interest thereon as set forth in the above receipt is hereby ratified and confirmed.

Dated February —, 1913.

FR. WESCHE.
HELENE J. v. SCHIERHOLZ";

that on or about June 19, 1918, petitioner's predecessor in office, acting under the authority of said Act and Executive Orders, after investigation, determined that said Mrs. von Schierholz was an enemy within the meaning of said Act, and thereafter demanded the Trust Company to deliver to him all said securities and cash so held in trust; that on or about March 28, 1919, the Trust Company
207 reported to the petitioner that it held, for the benefit of Wesche and Schierholz, additional sums of money designated respectively as "checking account" and "trust account"; that on or about the last named date the petitioner, acting under said Act and Executive Orders, further demanded the Trust Company to deliver to him the said cash moneys and certain securities therein described.

In these demands (copies of which were annexed to the petition and made a part thereof), it is recited that they are made pursuant to the authority vested in the Alien Property Custodian by the Trad-

ing with the Enemy Act and the amendments thereto and the proclamations and executive orders issued thereunder, and that after investigation the Custodian determined that the said Mrs. von Schierholz was an enemy within the purview and meaning of the said Act, not holding a license granted by the President. The later of the two demands, dated March 28, 1919, declared that the therein described securities and income accrued and collected thereon were by the Trust Company "owing and held for, on account of, on behalf of and for the benefit" of the said Mrs. von Schierholz, and that the Custodian seized the same and required that the securities be conveyed to him, and that the cash therein specified be delivered to him, both securities and cash to be held by him as such Custodian, to be administered and accounted for by him as provided by law.

The petitioner further alleged that by virtue of said determinations and demands made by petitioner and his predecessor in office, petitioner, as Custodian, was vested with all the beneficial interest
208 in said moneys and other properties, and that by virtue of said Act and Executive Orders and the facts alleged in the petition, he was the only person entitled to the said moneys and property, but that the Trust Company refused, and continues to refuse, to recognize his authority as Custodian, and refuses to deliver said money or property to him.

On the filing of such petition a rule was issued, requiring the Trust Company to turn over such moneys and properties to the petitioner, or show cause why an order should not be made requiring it to do so. On the hearing of this rule the Trust Company appeared and filed its answer, setting up a number of grounds for refusing to obey such demands. These may be grouped under two heads: First, that the Alien Property Custodian has not shown that he has complied with the provisions of the Trading with the Enemy Act, so as to entitle him to the possession of these properties; and second, that having appealed to a court of equity to enforce his demands, that court will determine the question of title or interest in such properties, and award possession to the Custodian only of such properties as belong to or are held for the benefit of any enemy.

Section 5(*a*) of the Act provides that "The President may exercise any power or authority conferred by this act through such officer or officers as he shall direct." Section 6 authorizes him to appoint an Alien Property Custodian who is "empowered to receive all money and property in the United States due or belonging to an enemy." By Executive Order of October 12, 1917, the Presi-
209 dent vested in the Alien Property Custodian, an officer appointed under the Act, "the executive administration of all the provisions of section 7(*a*), section 7(*c*) and section 7(*d*)" of the Act "including the power and authority conferred upon the President by the provisions of section 7(*c*)." By Executive Order of December 3, 1918, the President vested in such Custodian "the executive administration of all of the provisions of sub-section (*c*) of section 7" of the Act as amended by the Act of November 4, 1918.

The Custodian's demands upon the Trust Company were made under section 7(*c*) of the Act, the later demand after such subsection had been amended. As amended this subsection, so far as pertinent to the present inquiry, reads:

"(*c*) If the President shall so require any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act."

210 Section 7 (*e*) provides:

"No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

By these excerpts it is manifest that the Custodian, as the representative of the President, had ample authority to determine, after investigation, whether property was held for or on behalf of an enemy, and to insist that such property be turned over to him, if held for an enemy. Stoehr v. Garvan, U. S. (decided Feb. 28, 1921). And the Trust Company will be fully protected on a compliance with the Custodian's demands. Garvan v. Marconi Wireless Telegraph Co. of America, — Fed. — (decided by this Court on Sept. 20, 1921), and cases therein cited. However, while the making of such determinations and demands with reference to the properties in question is not disputed, it is insisted that the preliminary investigation required by the Act was not made. But this challenge is met by the positive assertion in the determinations and demands that investigation was made. This precludes any further inquiry in proceedings like the present, instituted under Section 17 of the Act, which are merely possessory. Central Union Trust Co. of N. Y. v. Garvan, — U. S. — (decided Jan. 24, 1921); Stoehr v. Garvan, supra.

The Trust Company also claims that at most but a part of this property is owned by Mrs. von Schierholz, and that a proper
211 investigation would have revealed that fact. Under the trust agreement herein set out the Trust Company held the securities therein referred to and the interest money to be derived therefrom, in trust "for the joint account of the said Frederick Wesche and Helene J. von Schierholz," and it was obligated to deliver or pay over such securities and interest "to either the said Frederick Wesche or to the said Helene J. von Schierholz, or to the survivor of them." So far as the Trust Company was concerned, it made no difference what were the relative rights of the cestuis que trustent in

and to these moneys and securities. It was bound to deliver them to either on demand. This being so, if either of these persons was an enemy within the meaning of the Trading with the Enemy Act, the Alien Property Custodian, by taking the requisite steps under the Act, which he did, would be substituted in the place of the enemy, and entitled to demand and recover the trust fund. By section 2 of this Act "any individual * * * of any nationality resident within the territory * * * of any nation with which the United States is at war" is an enemy within the meaning and purpose of the Act. This definition embraces Mrs. von Schierholz, for she was a resident of Germany which, at the time of the determinations and demands, was enemy territory.

The Trust Company concededly is but a trustee of these properties. Its contractual obligation to its cestuis que trustent was superseded by the duty cast upon it by the Trading with the Enemy Act. On the demands made by the Custodian it was its duty to com-
212 ply with them in every particular.

The question whether Wesche, or any other person other than Mrs. von Schierholz, has any title or interest in these moneys and securities, can be raised only by filing a claim and instituting the proceedings as provided by section 9 of the Act. Stoher v. Garvan, supra. American Exchange National Bank v. Garvan (C. C. A. 2), 273 F. 43. This section, as amended June 5, 1920 (long before the present suit was brought) amply protects the rights of claimants to properties taken over by the Alien Property Custodian, and a determination of such rights has no place in the present proceedings which, as noted, are purely possessory in character.

In the instant case the Trust Company's report to the Custodian showed that Mrs. von Schierholz was a resident of enemy territory, and that under the trust agreement she had a right to demand of the Trust Company that the moneys and securities in question be turned over to her. On that report alone the Custodian could justly determine that the properties were held for an enemy. Having so determined, his right to secure them can not be resisted or questioned by the Trust Company. This conclusion renders it unnecessary to consider any of the other grounds stated in the answer or briefs.

The rule is made absolute.

(Endorsed:) Filed Oct. 22, 1921, at 9 o'clock A. M. George T. Cranmer, Clerk.

213 *Order Substituting Thomas W. Miller for Original Petitioner.*

District Court of the United States for the District of New Jersey.

In Equity.

FRANCIS P. GARVAN, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY of New Jersey, a Corporation, Respondent.

In the Matter of the Application of FRANCIS P. GARVAN, as Alien Property Custodian, in re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thuringen, Germany, an Enemy.

Francis P. Garvan having ceased to be Alien Property Custodian and Thomas W. Miller having been duly appointed his successor as Alien Property Custodian and having duly qualified as such,

It is hereby ordered, that the said Thomas W. Miller as such Alien Property Custodian be, and he hereby is, substituted
214 as petitioner in this proceeding in place and stead of said Francis P. Garvan.

It is further ordered, that in all subsequent proceedings and papers herein the title of this proceeding be amended by inserting the name Thomas W. Miller in place and stead of the name Francis P. Garvan, wherever the same appears in such title.

Dated January 16, 1922.

JOHN RELLSTAB,
United States District Judge.

(Endorsed:) Filed January 16, 1922. George T. Cranmer, Clerk.

215 *Order Denying Application of Frederick Wesche.*

In the District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY of New Jersey, a Corporation, Respondent.

Upon Application of FREDERICK WESCHE for Leave to Intervene.

The above entitled matter came on to be heard before this Court regularly on its calendar on the 21st day of February, 1921, upon the petition of the above-named Frederick Wesche for leave to intervene in the proceeding instituted in this Court on the Equity side by Francis P. Garvan as Alien Property Custodian against the Commercial Trust Company of New Jersey instituted by the petition of said Garvan verified the 9th day of September, 1920, and by order to show cause issuing out of this Court, of date the 11th day of September, 1920, Selden Bacon, Esq., appearing as solicitor for said Wesche, and Elmer H. Geran and D. H. Stanley, Esqs.,
216 in opposition to said application on behalf of the Alien Property Custodian;

And Thomas W. Miller having succeeded said Francis P. Garvan as Alien Property Custodian, and having been substituted for him as petitioner in the said proceeding;

Now, upon reading and filing the said petition of Francis P. Garvan as Alien Property Custodian, and the order to show cause thereto annexed, and upon reading and filing the petition of the said Frederick Wesche for leave to intervene, and his proposed answer thereto annexed, and upon the order substituting Thomas W. Miller as Alien Property Custodian for the said Garvan as such, filed the sixteenth day of January, 1922, and after hearing Selden Bacon, Esq., on behalf of the petitioner in support of said application for leave to intervene and Frederick M. P. Pearce, Esq., on behalf of the Alien Property Custodian, in opposition thereto; and due consideration having been had, and upon the opinion filed upon this application by this Court and that filed by this Court in the proceeding between the Alien Property Custodian and said Commercial Trust Company of New Jersey, in which the said Wesche as such petitioner so sought to intervene, it is hereby

Ordered, that the application of said Wesche for leave to intervene in said proceeding be, and the same hereby is, denied.

January 16th, 1922.

JOHN RELLSTAB,
District Judge.

(Endorsed:) Filed January 16, 1922. George T. Cranmer, Clerk.

217 *Order Denying Application of Charles J. Ahrenfeldt.*

In the District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

Upon Application of CHARLES J. AHRENFELDT for Leave to Intervene.

The above entitled matter came on to be heard before this Court regularly on its calendar on the 21st day of February, 1921, upon the petition of the above-named Charles J. Ahrenfeldt for leave to intervene in the proceeding instituted in this Court on the Equity side by Francis P. Garvan as Alien Property Custodian against the Commercial Trust Company of New Jersey instituted by the petition of said Garvan verified the 9th day of September, 1920, and by order to show cause issuing out of this Court of date the 11th day of September, 1920, Selden Bacon, Esq., appearing as solicitor for said Ahrenfeldt and Elmer H. Geran and D. H. Stanley, Esq., in opposition to said application on behalf of the Alien Property Custodian;

218 And Thomas W. Miller having succeeded said Francis P. Garvan as Alien Property Custodian, and having been substituted for him as petitioner in the said proceeding;

Now, upon reading and filing the said petition of Francis P. Garvan as Alien Property Custodian, and the order to show cause thereto annexed, and upon reading and filing the petition of the said Charles J. Ahrenfeldt for leave to intervene, and his proposed answer thereto annexed, and upon the order substituting Thomas W. Miller as Alien Property Custodian for the said Garvan as such, filed the sixteenth day of January, 1922, and after hearing Selden Bacon, Esq., on behalf of the petition in support of said application for leave to intervene, and Frederic M. P. Pearse, Esq., on behalf of the Alien Property Custodian in opposition thereto; and due consideration having been had, and upon the opinion filed upon this application by this Court and that filed by this Court in the proceeding between the Alien Property Custodian and said Commercial Trust Company of New Jersey, in which the said Ahrenfeldt as such petitioner so sought to intervene, it is hereby

Ordered, that the application of said Ahrenfeldt for leave to intervene in said proceeding be, and the same hereby is, denied.

January 16th, 1922. JOHN RELLSTAB,
District Judge.

(Endorsed:) Filed January 16, 1922. George T. Cranmer, Clerk.

219 *Order Denying Motion to Strike Out Amended Answer.*

District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERICAL TRUST COMPANY OF NEW JERSEY, a Corporotion, Respondent.

In the Matter of the Application of THOMAS W. MILLER, as Alien Property Custodian, In re Certain Stocks, Bonds Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thurigen, Germany, an Enemy.

The above entitled matter having come on for hearing before this Court on the 21st day of February, 1921, and the petitioner having then upon the petition and the amended answer and two documents introduced in evidence and upon the stipulation of the parties in open court admitting as facts in the case everything in the amended
220 answer except as controverted by said two documents, moved to strike out the amended answer of the Commercial Trust Company of New Jersey, and the Court having taken the matter of said motion under advisement, and Thomas W. Miller as Alien Property Custodian having thereafter been substituted as petitioner in place and stead of Francis Garvan, the Court on this 16th day of January, 1922, after hearing D. H. Stanley, Esq., and Frederic M. P. Pearse, Esq., on behalf of the petitioner, in support of the said motion, and Selden Bacon, Esq., on behalf of the respondent in opposition thereto, and due consideration having been had,

It is hereby ordered and decreed that said motion to strike out be, and the same hereby is, denied.

Dated January 16th, 1922.

JOHN RELLSTAB,
United States District Judge.

(Endorsed:) Filed January 16, 1922. George T. Cranmer, Clerk.

221 *Final Decree.*

In the District Court of the United States for the District of New Jersey.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

vs.

COMMERICAL TRUST COMPANY OF NEW JERSEY, Respondent.

This cause coming on to be heard on the 21st day of February, 1921, upon a rule to show cause directed to the Commercial Trust Company of New Jersey, said rule having been issued pursuant to a petition filed by Francis P. Garvan as Alien Property Custodian; upon such petition and upon an amended answer in the nature of a return to the said rule filed by the Commercial Trust Company of New Jersey; and upon the documents then introduced in evidence on the part of the petitioner and the stipulation of admission made in open court as to the allegations and denials of the answer except as controverted by such documents; and the motion of the petitioner to strike out the amended answer having been denied; and upon the argument of counsel made on behalf of Francis P. Garvan, as Alien Property Custodian, and of counsel for the Commercial
222 Trust Company of New Jersey, and Thomas W. Miller, as Alien Property Custodian, having been substituted as petitioner in place and stead of said Garvan, by Order and Decree of this Court of January 16th, 1922; and thereupon further argument having been had, now upon motion of the Petitioner D. H. Stanley, Esq., and Frederic M. P. Pearse, Esq., appearing for the Petitioner and Selden Bacon, Esq., for the Respondent, and full consideration having been had; upon the said Rule to Show Cause and Petition and Amended Answer thereto and upon such documents and stipulation, and all other the proceedings herein; and upon the said order of substitution, and the opinions of this Court herein,

It is adjudged, ordered and decreed that the Commercial Trust Company of New Jersey do forthwith convey, transfer, assign, deliver and pay to Thomas W. Miller as Alien Property Custodian, all of the money and other property held by it under a certain trust agreement entered into on January 30, 1913 by and between the Commercial Trust Company of New Jersey of the one part and Frederick Wesche and Helene J. v. Schierholz of the other part (a list of the moneys held on October 1st, 1920 under the said trust and of the other property held under the said trust on February 21st, 1921, being annexed hereto marked Exhibit "A" and made a part hereof) together with the interest and income realized upon the cash so held in the said trust from October 1st, 1920 and any accretions
223 thereto from October 1st, 1920 to February 21, 1921 and interest and income of any kind or description whatsoever secured upon the said other property since February 1st, 1921.

Done this 19th day of January, 1922.

JOHN RELLSTAB,
United States District Judge.

EXHIBIT A.

Cash on Hand October 1, 1920.

In the Trust Account	$12,924.29	
" " "	8,862.16	
" " "	19,063.99	
" " "	20,732.69	
Total		$61,583.83
In the Checking Account	12,438.46	
" " "	11,624.45	
" " "	8,345.31	
" " "	8,588.59	
Total		$40,996.81
Grand Total		$102,580.64

Securities on Hand February 21, 1921.

$2,000
$5,000
$3,000 — Kings County Lighting Co. 5% 1st Refdg. Mtge. Gold Bonds, Nos. 2131-4, 2137-41, 2354.

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$3,000
$7,000 — Adirondack Electric Power Corporation 1st Mtg. 5% Gold Bonds, Nos. 3949-52, 4156-9, 4126-7.

$5,000
$5,000 — Hudson Navigation Co. 6% Gold Mtge. Bonds Nos. 116-8, 605-6, 1143-7.

$15,000
$15,000
$5,000
$5,000 — Suncrest Lumber Company Bonds.

$5,000
$5,000
$6,000 — The Duluth Street Ry. Co. 5% 1st Mtge. Gold Bonds, Nos. 1-5, 1082-1091, 2069.

$24,000
$5,000
$6,000
$5,000 — Central Georgia Power Co. 1st Mtge. S. F. 5% Gold Bonds, Nos. $500. Bonds D2912-31, $1,000, Bond M1927-56.

$6,000 — Fonda, Johnstown & Gloversville R. R. Co. 1st Con. Genl. Refg. Mtge. 4½% Gold Bonds, Nos. 2360-5.

$9,800
$8,000
$16,500
$18,700 — U. S. of America 4% Second Liberty Loan Bonds.

$5,000 } Omaha Water Works of the City of Omaha, Nos. 7058,
$5,000 } 7025-33.

$7,000 } Tacoma Easterin R. R. Co. 1st Mtge. 5% Gold Bonds Nos.
$2,000 } 462-470.

$28,000 City of Chicago, City Hall, 4% Bonds, Nos. 1611-9, 1676-82, 2297-8, 2489-95, 2528-30.

$5,000 Montreal Tramways Co. 1st & Refdg. 5% Gold Bonds, Series A, Nos. 4116-20.

225

$5,000 } Gulf & Ship Island R. R. Co. 1st Mtge. Refdg. & Terminal
$5,000 } 5% Gold Bonds, Nos. 311-3, 320, 456-8, 780-1, 1817.

$5,000 City of Memphis Bonds (4¼%).

$11,000 City of Memphis Bonds (4½%).

$5,000 Norfolk Southern R. R. Co. 1st & Refdg. Mtge. 5% Bonds Series A, Nos. M 1386-90.

$10,000 } City of Jersey City Water 4½% Gold Bonds Nos. 2165-74,
$10,000 } 2176-85.

$5,000 } Westchester Lighting Co. 1st Mtge. 5% Gold Bonds, Nos.
$5,000 } 3411-3, 3769-71, 5811-4.

$42,000 } Corporate Stock of the City of New York Nos.
$83,000 } 2270-2273, 2365-2368, 2375, 2398, 2716, 2722, 2724-v2 v2 v2 v2 v2 v2 v2 v2 v2
2726, 7700-7714, 7742, 10521-10525; 80-2, 151-3, 156-7, v2 v2 v2 v2 v2 v2
10143-52, 10415-18, 10420-7 v3 under all Nos.; for the extension of Riverside Drive Nos. 25520-4; for the payment of assessments Nos. 30008-12; to provide for the supply of water Nos. 655-698.

$10,000 City of Los Angeles Water Works, 4½% bonds Class F, Nos. 9522-6, 11349-53.

(Endorsed:) Filed Jan. 19, 1922 at 9 o'clock A. M. George T. Cranmer, Clerk.

226 *Assignments of Error of Appellant.*

United States District Court, District of New Jersey.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

Assignments of Error by the Commercial Trust Company of New Jersey.

The above named respondent and petitioner for leave to appeal hereby assigns the following errors as grounds for its appeal in the above entitled matter:

1. The Court erred in making the order and decree appealed from directing this respondent to forthwith account for, convey, transfer, assign, deliver and pay to Thomas W. Miller as Alien Property Custodian the money and other property described and set forth in the petition herein and in the amended answer, with any accretions thereon or changes therein.

2. The Court erred in making the order and decree appealed from for such order and decree is in conflict with the provisions of
227 the Fourth and Fifth Amendments to the Constitution of the United States prohibiting unreasonable seizures and prohibiting deprivation of property without due process of law and prohibiting the taking of private property for public use without just compensation and is not within the provisions of any rules authorized to be made by Congress concerning captures on land or water by the provisions of Section 7 of Article I of the Constitution of the United States.

3. The Court erred in overruling this respondent's objections to the demand, Exhibit B of the petition, that it turn over to the Custodian the property therein described.

4. The Court erred in overruling this respondent's objections to the demand, Exhibit C of the petition, that it turn over to the Custodian the property therein described.

5. The Court erred in holding that the statement in the demand, Exhibit B of the petition, that the Custodian Palmer had determined the ownership of the property in question after investigation, precluded inquiry in the present proceeding as to whether the investigation required by law had been made by the Custodian prior to such determination.

6. The Court erred in holding that the statement in the demand, Exhibit C of the petition, that the Custodian Garvan had determined

the ownership of the property in question after investiga-
228 tion, precluded inquiry in the present proceeding as to whether the investigation required by law had been made by the Custodian prior to such determination.

7. The Court erred in holding that the annexing of the document Exhibit B to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership of the property in that document described after investigation.

8. The Court erred in holding that the annexing of the document Exhibit C to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership of the property in that document described after investigation.

9. The Court erred in holding that an admission that the manner of deposit with this respondent of the property in question, when it was admitted that severable parts thereof were not and had not been owned by an enemy or ally of enemy was equivalent to a determination of ownership thereof by the Custodian after investigation, and could take the place thereof.

10. The Court erred in holding that the present proceeding is merely possessory in character.

11. The Court erred in holding that the making of the determination specified in Exhibit B was not disputed.

229 12. The Court erred in holding that the making of the determination specified in Exhibit C was not disputed.

13. The Court erred in holding that the statement in Exhibit B that investigation of the ownership of the property was made before determination thereof adequately met the admission made in open court of the allegations concerning such determination and investigation contained in the amended answer.

14. The Court erred in holding that the statement in Exhibit C that investigation of the ownership of the property was made before determination thereof adequately met the admission made in open court of the allegations concerning such determination and investigation contained in the amended answer.

15. The Court erred in holding that the Alien Property Custodian could lawfully in this proceeding assert greater rights over the property in question in the right of Mrs. von Schierholz than Mrs. von Schierholz could lawfully have done in the absence of war, in her own right.

16. The Court erred in holding that the property of persons other than enemies is the subject of capture, when not in actual hostile use against the United States, or within a region where active hostilities are being conducted.

17. The Court erred in holding that property, several identifiable parts of which were owned by citizens or neutrals in severalty,
230 and only a severable part by enemies, was subject to capture as a single item of property.

18. The Court erred in holding that a deposit of property, made years before the war was declared in the joint names of an enemy and a neutral, with stated power to either to withdraw it, was subject to capture, by virtue of that fact alone, as enemy property in its entirety, irrespective of the actual ownership of the several parts thereof, and of the several individual personal ownership by such neutral of a several part thereof, without prior investigation of the real ownership by the Custodian.

19. The Court erred in holding that where personal property had been deposited with a bailee, under an ante-bellum contract running to an enemy and a neutral with express power to either to withdraw the property from deposit, such fact alone after the declaration of war, irrespective of notice of the real ownership of the property by persons not enemies, justified a determination that the property was held for an enemy.

20. The Court erred in holding that on the report alone Exhibit A of the petition, the Alien Property Custodian could justly determine that the properties in question were all held for an enemy, without other investigation.

21. The Court erred in holding that an amendment of the Trading with the Enemy Act, enacted by Congress subsequent to the
231 making of both the demands set up in the petition, as Exhibits B and C thereof, could cure a constitutional invalidity of the Trading with the Enemy Act as it existed at the time the said demands severally were made, and validate such prior demands and pretended determinations, without a new determination and demand made by the Alien Property Custodian according to law after the passage of such amendment; and in holding that such amendment could constitutionally have such effect in spite of the provisions of the V Amendment to the United States Constitution.

22. The Court erred in holding that after the declaration of war by the United States on April 6, 1917, the Trust Company had any power or authority to deliver the property in question (other than so much thereof as was individually owned by her) to Helene von Schierholz by virtue of the terms of the agreement of deposit.

23. The Court erred in holding that the Trust Company's report showed that under the trust agreement Mrs. von Schierholz at any time after April 6, 1917, had a right to demand of the Trust Company that the moneys or securities in question or any thereof be turned over to her, other than such as were her individual several property.

24. The Court erred in holding that a determination of ownership of property by the Custodian, made without evidence to support it, with notice that it was contrary to the real ownership,
232 with notice where exact evidence of the ownership could be obtained, and made without inquiry and without investigation of the real ownership, and in fraud of the rights of the real owner, prevents any resistance to or questioning of such determination in a court of equity by such owner or his bailee in possession of the property when the Custodian appeals to such a court for its aid in securing delivery of the property to him.

25. The Court erred in holding that a Court of Equity should order property turned over to the Alien Property Custodian that he on the conceded facts had no lawful right to hold.

26. The Court erred in holding that a Court of Equity should order the property in question, or any thereof, turned over to the Alien Property Custodian as the property of Mrs. von Schierholz, when he was by law required to return to her any property of hers seized by him, even without prior application by her, under and by virtue of the provisions of Section 9 of the Trading with the Enemy Act, Subdivisions *b*) 3 and *b*) 8 as amended by the Acts of Congress of June 5, 1920 and February 27th, 1921, she having admittedly been born a citizen of the United States, and having lost her citizenship solely by her marriage to a German subject prior to 1914, and having derived whatever rights of ownership she had in the property from her father, an American citizen, and having acquired whatever rights or powers or interests she had therein long prior to August 1st, 1914.

233 27. The Court erred in refusing to consider any of the objections specified in and by the amended answer of the Commercial Trust Company of New Jersey other than those mentioned in its opinion.

28. The Court erred refusing to find that at the time of each of the demands set forth in the petition as Exhibits B and C thereof respectively the provisions of Section 7 of the Trading with the Enemy Act were unconstitutional and invalid so far as they authorized the seizure by the Custodian of property of American citizens not resident in any Judicial District of the United States and not enemies, or of neutrals not resident within any judicial district of the United States, such as Charles J. Ahrenfeldt and Frederick Wesche were respectively admitted to be.

29. The Court erred in refusing to hold the demands set forth in the petition as Exhibit B thereof void, as not constituting due process of law.

30. The Court erred in refusing to hold the demands set forth in the petition as Exhibit C thereof void, as not constituting due process of law.

30-*a*. The Court erred in failing to hold the provisions of the Trading with the Enemy Act, authorizing seizure by the Alien

Property Custodian of money or property not belonging to enemies or allies of enemies and aid of the Courts in securing delivery of such property to him, unconstitutional in the absence of
234 provision for payment of either interest or damages for the period of detention of such property before return.

31. The Court erred in holding that amendment of the Trading with the Enemy Act in July 1919 after the demands made and after any pretended determination of ownership of the property in question (whether with or without prior investigation) but prior to the institution of this equity proceeding could constitutionally cure any invalidity in those demands and pretended determinations, and bar all inquiry by a Court of Equity, upon the petition of the Custodian herein filed, into the real ownership of the property, and conclusively require and authorize award of the possession of the property in question to the Alien Property Custodian on the petition herein, which contains no allegation of any determination of the ownership by the Alien Property Custodian subsequent to the enactment of such amendment, and especially when the Alien Property Custodian admitted in open Court upon the hearing that all the allegations of the amended answer as to the ownership of the property were true.

32. The Court erred in holding that the Trust Company would be fully protected on a compliance with the Custodian's demands, Exhibits B and C of the original petition herein.

33. The Court erred in holding that the question whether Wesche or any other person other than Mrs. von Schierholz has any title or interest in these moneys or securities can be raised only
235 by filing a claim and instituting proceedings as provided by Section 9 of the Trading with the Enemy Act.

34. The Court erred in holding that a Court of Equity cannot, in a proceeding like the present, consider the rights of those against whom relief is sought as a condition of granting relief to the petitioner.

35. The Court erred in holding that a Court of Equity can entertain a purely possessory proceeding without regard to the equities and rights of the parties before it.

36. The Court erred in holding that the Alien Property Custodian did not, by applying to a Court of Equity for relief, waive the right to obtain possessory award otherwise than upon equitable considerations and conditions.

37. The Court erred in failing to hold that the admission on the record of the truth of the allegations of the amended answer as to the ownership of the property therein mentioned was the first determination of the ownership thereof made by any Enemy Property Custodian after investigation.

38. The Court erred in failing to hold that the admission by the Alien Property Custodian made in open court that the property in

question all was and had been owned as stated in the amended
236 answer herein, was a determination by the Alien Property Custodian, made after investigation, which superseded all prior pretended determinations by the Custodians or either of them.

39. The Court erred in holding that the petitioner is entitled to relief from this equity court without meeting the requirements of equity as to doing equity.

40. The Court erred in holding that it would direct a delivery to the Custodian as successor to the right of Mrs. von Schierholz, which it would have been a breach of trust for her to demand.

41. The Court erred in failing to hold that the petitioner (by petitioning in equity and proceeding by order that the respondent show cause if any there be why the property should not be turned over and assigned to the Custodian, and by omitting from his petition any allegations that he had, after investigation thereof, determined the ownership of the property in question) had sought a determination by the Court of the ownership of the property after its hearing the evidence concerning such ownership, and had given to the respondent the right to present the evidence of real ownership and to have a determination by the Court accordingly.

42. The Court erred in holding that the relief given by it to the Alien Property Custodian was not in conflict with the provisions of the V Amendment to the Constitution providing that no
237 person shall be deprived of property without due process of law.

43. The Court erred in holding that the Trading with the Enemy Act, in so far as it authorized seizure of private property not in use in hostility to the United States and not within any area of actual hostilities, belonging to persons not enemies of the United States, but who did not reside in any judicial district of the United States, was, prior to July 11th, 1919, constitutional and valid.

44. The Court erred in holding that it would give is assistance to the Alien Property Custodian by requiring any property to be turned over to him as the property of Mrs. von Schierholz at a time when surrender to her by him, even without prior application by her, of all property belonging to her, was provided for by law.

45. The Court erred in failing to hold that the petitioner had not alleged that any determination of the ownership of the property had been made by either Alien Property Custodian after investigation.

46. The Court erred in holding the petition sufficient to entitle the petitioner to relief otherwise than in accordance with the actual ownership of the property, as alleged in the amended answer and admitted on the hearing, when the petition contained no allegation that either Custodian had, after investigation, determined the ownership to be otherwise.

238 47. The Court erred in holding that the owners of parts of the property in question who were not enemies, Mr. Ahren-

feldt and Mr. Wesche could be deprived of their property without due process of law.

48. The Court erred in holding that the demand of the Alien Property Custodian Palmer, Exhibit B of the original petition, contituted due process of law.

49. The Court erred in holding that the demand of the Alien Property Custodian Garvan, Exhibit C of the original petition, constituted due process of law.

50. The Court erred in holding that a purely possessory proceeding could be maintained by the Alien Property Custodian under the provisions of the Trading with the Enemy Act and the amendments thereof to obtain possession of property not actually belonging to an enemy or ally of enemy and not in use in hostility to the United States in the absence of an actual determination (after investigation) by the Custodian, authorized by law at the time it was made, of the ownership of such property, on the ground that the Custodian might have made such a determination on the papers submitted to him.

51. The Court erred in holding that the Custodian could dispense with the duty of investigation, before determination by him of ownership of property under the provisions of the Trading
239 with the Enemy Act, and in holding that the Trading with the Enemy Act so construed was constitutional in so far as it authorized capture of property not owned by an enemy or ally of enemy and not in actual hostile use against the United States or within a region where hostilities were being actively conducted, and that it was not so construed, in such cases in conflict with the provisions of either the IV or V Amendments to the United States Constitution.

52. The Court erred in holding that a Court of Equity was bound to exercise its special powers in favor of the Alien Property Custodian without regard to the real and equitable rights of this respondent and those whose rights it here represented.

53. The Court erred in holding constitutional and valid the provisions of the Trading with the Enemy Act which authorize seizure by the Custodian of private property belonging to persons not enemies or allies of enemies and which was not in actual military use against the United States or within any area of actual hostilities.

54. The Court erred in directing delivery to the Alien Property Custodian of any property admittedly belonging at all times after January 1st, 1914, to Frederick Wesche, who was admittedly never an enemy.

55. The Court erred in directing delivery to the Alien
240 Property Custodian of any property admittedly belonging at all times after January 1st, 1914, to Charles J. Ahrenfeldt, who was admittedly never an enemy.

56. The Court erred in directing delivery to the Alien Property Custodian in this proceedings of any property which was admittedly not the property of Helene J. von Schierholz and had not been.

57. The Court erred in holding that the demand Exhibit B of the petition was a lawful exercise of the right of capture under Clause 11 of Section 8 of Article I of the Constitution of the United States.

58. The Court erred in holding that the demand Exhibit C of the petition was a lawful exercise of the right of capture under Clause 11 of Section 8 of Article I of the Constitution of the United States.

59. The Court erred in holding that the provisions of Section 7 of the Trading with the Enemy Act, prior to the amendment of July 11th 1919, were, so far as they authorized the seizure or capture of property belonging to persons not enemies or allies of enemies of the United States and not resident within any judicial district of the United States, a valid exercise of the power "to make rules concerning captures on land and water" conferred by Clause 11 of Section 8 of Article I of the Constitution of the United
241 States, and not in conflict with the prohibitions contained in the IV and V Amendments to the Cnstitution of the United States.

60. The Court erred in holding that the Act of Congress of July 11th 1919, could constitutionally (and in disregard of the V Amendment of the Constitution of the United States) operate, retro-actively, to validate provisions of the Trading with the Enemy Act of October 6th, 1917, unconstitutional when adopted, as of a time prior to the enactment of such amendment and to validate acts attempted to be done under such unconstitutional provisions prior to the enactment of such Act of July 11th, 1919.

61. The Court erred in holding that the right of capture, in the case of property owned in severalty, part by one not an enemy or ally of enemy of the United States, and part by an enemy, could extend beyond the part or share belonging to the enemy.

62. The Court erred in holding the Trading with the Enemy Act constitutional in so far as it permitted capture of property on land not belonging to an enemy or ally of enemy, and not in use against the United States, and not within any region in which hostilities were being actively conducted.

63. The Court erred in ruling that after April 6th, 1917, under the trust agreement either Mrs. von Schierholz or Mr. Wesche could demand the possession of the properties therein covered.

242 64. The Court erred in holding that it was the duty of the Trust Company to comply with the demands of the Alien Property Custodian and turn over all the property demanded to him.

65. The Court erred in holding that the question of other persons' ownership or interest in the properties demanded was irrelevant in this proceeding.

66. The Court erred in holding that the questions arising out of the various rights in and to the property can be raised only after the demands of the Alien Property Custodian have been complied with, and by instituting proceedings authorized by Section 9 of the Trading with the Enemy Act as amended.

67. The Court erred in awarding custody of the property or any thereof as the property of Helene von Schierholz to the Alien Property Custodian after the enactment of the Act of Congress of February 27th, 1921, amending the Trading with the Enemy Act.

68. The Court erred in holding that, after the passage of the joint resolution of Congress declaring the state of war between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, the Enemy Property Custodian had any power, right or authority to reduce to his possession as such
213 Custodian by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such Custodian, other than property actually belonging to the Imperial German Government, or its successor or successors or to German Nationals.

69. The Court erred in holding that after the signature and ratification of the treaty with Germany of date August 25th, 1921, and the exchange of ratifications thereof between the two governments, the Enemy Property Custodian had any power, right or authority to reduce to his possession as such Custodian, by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such Custodian, other than property actually belonging to the Imperial German Government, its successor or successors, or to German Nationals.

70. The Court erred in failing to hold that, after the passage of the joint resolution of Congress declaring the State of War between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, and the proclamation of peace by the President of the United States, and the signature and ratification of the treaty of peace between the United States and Germany of date August 25th, 1921, and the exchange of ratifications of
214 such treaty, the Alien Property Custodian could not by virtue of determination of enemy ownership of property by him and demand thereof accordingly maintain any possessory proceeding by virtue of the Trading with the Enemy Act, and the amendments thereof, to reduce to his possession as Alien Property Custodian any property, so previously demanded by him as property of German

enemies of the United States, unless such property had actually belonged either to the Imperial German Government, or its successor or successors, or to German Nationals.

71. The Court erred in failing to hold that upon the termination of the war all right of capture under the provisions of the Trading with the Enemy Act and all right of completing capture attempted by demand of the property but not theretofore completed by actual reduction of the property to possession by the Custodian ceased and determined, save and except only as to such property as was specifically excepted by the terms of the peace resolution of July 2nd, 1921 and by those of the treaty of peace with Germany of August 25th, 1921, namely, all property of the Imperial German Government, or its successor or successors, and of all German Nationals which had been the subject of a demand, and all property of the Imperial and Royal Austro-Hungarian government or its successor or successors and of all Austro-Hungarian Nationals, which had been the subject of such demand; and in failing to hold that, it appearing
245 that part of the property herein sought to be recovered was not of such excepted character, no possession could be herein awarded to the Custodian of such property which did not and had not belonged to said Governments or any of them or to German or Austro-Hungarian Nationals.

72. The Court erred in refusing to hold that the amendment of the Trading with the Enemy Act by the Act of July 11th, 1919 (as construed by it, as validating determinations and demands made by the Custodian prior to the enactment of such amendment as to which the provisions of the Trading with the Enemy Act as previously existent were unconstitutional) was invalid and unconstitutional, as in conflict respectively with the provisions of the Constitution of the United States, to wit, those of the Fifth Amendment of the Constitution of the United States, forbidding that any person be deprived of property without due process of law, and those forbidding the taking of private property for public use without just compensation and in conflict with the provisions of the Fourth Amendment to the Constitution of the United States forbidding unreasonable seizures.

73. The Court erred in holding that this proceeding was a possessory one, when the demands Exhibits A and B of the original petition were both void because made under a statute which was unconstitutional at the time they were made, as to the owners of parts of the property involved, to wit, Frederick Wesche a neutral resident at all times since 1914 in Switzerland and Charles J. Ahrenfeldt, an American citizen resident, at the times when said
246 demands were each made and since, outside of the United States in London, England and in Switzerland, providing for seizure of property of persons not enemies without due process of law.

74. The Court erred in holding that a capture by the Custodian was completely effected of the property here in question before the

exchange of ratifications of the treaty of peace, by the demands shown and the institution of this proceeding, without the actual reduction to his possession of the property or any part thereof.

75. The Court erred in holding that the stipulation in the treaty of August 25th, 1921, between the United States and Germany according to the United States the benefit of the provision in the joint resolution of Congress of July 2, 1921, that all property of all German Nationals which had been the subject of a demand by the United States of America or of any of its officers, agents or employees should be retained by the United States of America and no disposition thereof made except as specifically provided by law, was (as construed by the Court as applicable to property of individual German Nationals, which had been merely made the subject of a demand or demands by the Alien Property Custodian without actual reduction to possession or physical capture) constitutional and valid and not within the prohibitions of the V Amendment to the Constitution of the United States.

247 76. The Court erred in holding that the Joint Resolution of Congress of July 2d, 1921, in so far as it authorized completion of uncompleted captures of private property after the conclusion of peace and the exchange of ratifications of the treaty of August 25th, 1921, was constitutional and valid and not within the provisions of the V Amendment to the Constitution of the United States forbidding that any person shall be deprived of his property without due process of law, and forbidding the taking of private property for public use without just compensation.

77. The Court erred in holding that the Trading with the Enemy Act, and the Amendments thereof, the Joint Resolution of Congress of July 2d, 1921, the Proclamation of Peace by the President of the United States, and the treaty of August 25th, 1921, and the exchange of ratifications thereof, all and severally, were constitutional and not within the prohibitions of the V Amendment to the Constitution of the United States forbidding the taking of private property for public use without just compensation, and forbidding that any person should be deprived of his property without due process of law, as the same were construed by the Court as authorizing completion (as against individual owners), after the conclusion of peace, of captures by the Custodian of private property individually owned, not previously reduced to actual possession by him.

248 78. The Court erred in assisting a capture of individually owned private property by the Custodian after the conclusion of peace.

79. The Court erred in assisting a capture of individual private property, belonging to an American citizen, by the Custodian, after the conclusion of peace.

80. The Court erred in holding that after the conclusion of the treaty of peace the Alien Property Custodian was authorized to prosecute any proceeding for the purpose of reducing to his possession property not actually so reduced to possession prior to the conclusion of peace.

81. The Court erred in holding that it had any jurisdiction to entertain a purely possessory proceeding by the Custodian after the conclusion of peace.

82. The Court erred in not denying the petition of the Custodian.

83. The Court erred in failing to hold that the provisions of the Trading with the Enemy Act authorizing purely possessory proceedings by the Alien Property Custodian to recover possession of property which he had required to be delivered to him as
249 enemy property, had become unconstitutional with the termination of the war.

FISK & FISK,
Solicitors for the Commercial Trust Company of New Jersey, Respondent and Petitioner for Leave to Appeal.

SELDEN BACON,
J. FISHER ANDERSON,
Of Counsel.

(Endorsed:) Filed Jan. 19, 1922 at 9 o'clock A. M. George T. Cranmer, Clerk.

Due service of a copy of the within assignments of error hereby admitted this 19th day of January, 1922.

ELMER H. GERAN,
Solicitor for Thomas W. Miller, as Custodian.

250 *Petition for Appeal and Stay and Allowance of Same.*

District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of THOMAS W. MILLER, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thurigen, Germany, an Enemy.

To the Honorable Judges of the United States District Court for the District of New Jersey:

The above-named Commercial Trust Company of New Jersey, respondent in the above-entitled proceeding, conceiving itself aggrieved by the order and decree made and entered in the above-entitled proceeding on the 19th day of January, 1922, granting the
251 prayer of the petitioner and ordering this respondent to forthwith account for, convey, transfer, assign, deliver and pay over to the petitioner as Alien Property Custodian all the money and other property disclosed in the said report of said Trust Company of December 19th, 1917, to the Custodian, as modified by the succeeding investments and collections thereof shown in the said amended answer of the Commercial Trust Company of New Jersey, and any accretions thereon or changes therein since the date of such amended answer, in accordance with the prayer of the petition, does hereby appeal from said order and decree and from each and every part thereof to the United States Circuit Court of Appeals for the Third Circuit, for all and several the reasons specified in its assignment of errors, which is filed herewith; and said Commercial Trust Company of New Jersey prays that this appeal my be allowed and made returnable to the United States Circuit Court of Appeals for the Third Circuit and that citation issue thereon as provided by law and that a transcript of the record and proceedings stipulation and papers and exhibits upon which said order and decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals for the Third Circuit.

And your petitioner further prays that upon its giving bond in an amount to be fixed by this Court, said appeal may operate as a supersedeas and suspend during the pendency of such appeal, the effect of said decree and order of the Court.

252 And your petitioner presents herewith hereto annexed its agreement to hold the property involved in said proceeding, pending such appeal.

Dated January 19th, 1922.

FISK & FISK,
Solicitors for Commercial Trust Company of New Jersey, Respondent and Petitioner for Leave to Appeal.

The Commercial Trust Company of New Jersey, the petitioner for appeal above named, in consideration of the Court's fixing the amount of supersedeas bond on the appeal within prayed for at $20,000 hereby undertakes and agrees that pending said appeal it will hold the property and money covered by said decree and not deliver the same to any person other than the Alien Property Custodian without the consent and order of this Court or of the Appellate Court.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. S. PERKINS,
Vice-President.

253 STATE OF NEW JERSEY,
County of Hudson, ss:

On this 17th day of January, 1922, before me personally came Jay S. Perkins, to me personally known and known to me to be one of the Vice-presidents of the Commercial Trust Company of New Jersey, who being by me first duly sworn did depose and say that he resides at Jersey City in the County of Hudson, in the State of New Jersey; that he is one of the vice-presidents of said Commercial Trust Company of New Jersey, the corporation described in and which executed the foregoing instrument, that he knows the corporate seal of said corporation that the seal affixed to the above instrument is such corporate seal, that the same was affixed thereto by authority of the Board of Directors of such corporation, and that he signed the same in the corporate name by like authority.

J. FISHER ANDERSON,
Master in Chancery of New Jersey.

And Now, to wit, this 19th day of January, 1922, upon consideration of the foregoing petition and annex- agreement, it is, on motion of Fisk & Fisk, solicitors for the Commercial Trust Company of New Jersey, the petitioner for appeal,

Ordered by this Court, that the appeal prayed for therein be and the same is hereby allowed to the Commercial Trust Company of New Jersey from the above described decree, and that said appeal shall be returnable to the United States Circuit Court of Appeals
254 for the Third Circuit and that upon the execution and filing of a cost and supersedeas bond in the penal sum of $20,000

with a surety to be approved by this Court, said appeal shall operate as a supersedeas of said decree and shall suspend until the final decree on appeal herein the effect of said decree; and that a transcript of the record including all the testimony and proceedings at the trial and the stipulation there made shall be filed in the Circuit Court of Appeals aforesaid according to law as so prayed for.

It is further ordered that the property held by said Commercial Trust Company which is the subject of the decree so appealed from shall not pending the appeal and until the final determination thereof be delivered or paid over by said Commercial Trust Company to anyone other than the Alien Property Custodian without the consent and order of this Court or of the Appellate Court.

JOHN RELLSTAB,
United States District Judge.

Dated January 19th, 1922.

(Endorsed:) Filed Jan. 19, 1922, at 9 o'clock A. M. George T. Cranmer, Clerk.

Service of copy of within petition for appeal and allowance hereby admitted this 19th day of January, 1922.

ELMER H. GERAN,
Solicitor for Custodian.

255 *Bond on Appeal.*

District Court of the United States of America for the District of New Jersey, in the Third Circuit.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of THOMAS W. MILLER, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thurigen, Germany, an Enemy.

Bond for Damages and Costs.

Know all men by these presents:

That we, Commercial Trust Company of New Jersey, as Principal and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, and duly authorized to transact business in the State of New Jersey,
256 as Surety, are held and firmly bound unto the above named Thomas W. Miller, as Alien Property Custodian, his succes-

sors and assigns, in the sum of Twenty Thousand ($20,000.00) Dollars, to be paid to the said Thomas W. Miller, as Alien Property Custodian, his successors and assigns, for the payment of which, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals dated the 17th day of January, 1922.

Whereas, the above named Commercial Trust Company of New Jersey has prosecuted an appeal to the United States Circuit Court of Appeals for the Third Circuit to reverse the order and decree made and entered on the 19th day of January, 1922 in the above entitled suit, in the District Court of the United States for the District of New Jersey.

Now, therefore, the condition of this obligation is such, that if the above named Commercial Trust Company of New Jersey, shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its appeal good, then this obligation shall
257 be void, otherwise the same shall be and remain in full force and virtue.

[Corporate Seal.]

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. W. HARDENBERGH,
President.

Attest:
R. S. CARMICHAEL,
Secretary.

[Corporate Seal.]

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN B. GEYLER,
Attorney in Fact.

Attest:
CHARLES VOLLHERBST,
Att'y in Fact.

STATE OF NEW JERSEY,
Hudson County, ss:

Be it remembered that on this 18th day of January, 1922, before me personally appeared Robert S. Carmichael who being by me duly sworn does depose and make proof that he is Secretary of Commercial Trust Company of Ney Jersey, the principal named in and which executed the foregoing bond; that said bond was executed by J. W. Hardenbergh, who was at the date of the execution thereof the President of said Company; that he well knows the corporate seal of said Company and that the seal thereto affixed is the
258 corporate seal of said Company; that said bond was executed and said seal affixed by order of the Board of Directors of said corporation as the voluntary act and deed of said company for the uses and purposes therein expressed.

ROBERT S. CARMICHAEL.

Subscribed and sworn to before me the date aforesaid.

JOSEPH J. CARISSIMI,
Att'y at Law, N. J.

Statement.

United States Fidelity and Guaranty Company,

Baltimore, Md.

At the Close of Business June 30, 1921.
Commenced Business August 1, 1896.

Assets.

Par value.		Market value.
$7,109,250.00	Government bonds	$6,685,957.23
5,537,271.15	Baltimore City and other Municipal, State and County Bonds	4,921,561.86
259		
2,395,600.00	Railroad and Equipment bonds	1,962,009.50
255,000.00	Electric Railway Bonds	181,350.00
4,096,658.22	Public Utility and Miscellaneous Bonds	3,623,238.25
315,890.00	Bank and Trust Company Stocks	619,060.00
165,400.00	Railroad Stocks	122,360.00
464,575.00	Miscellaneous Stocks	324,603.00
100,000.00	Lawyers Surety Co. Stock, represented by $150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York, and other assets	123,500.00
$20,439,644.37	Total Bonds and Stocks — Market Values June 30th, 1921	$18,563,639.84
	Home Office Property appraised by Insurance Department of Maryland	750,000 00
	Other Property appraised by Insurance Department of Maryland	76,582.72
	Home Office Addition	364,143.73
	New York Property, appraised by Insurance Department of New York	859,920.16
	Loans secured by pledge of Collaterals	48,762.84
260		
	Loans secured by Mortgages	53,300.00
	Cash on Hand and in Depositories	2,979,722.08
	Premiums in course of collection, not more than three months due	7,283,694.92

	Market value.
Deposits with Workmen's Compensation Reinsurance Bureau	315,932.52
Interest due and accrued	256,678.58
Due for Subscriptions, Department Guaranteed Attorneys	68,511.01
Distributable Portion of Company's Insurance Premiums in course of collection on Coal Mines and Prohibited Risks, not over 3 months due	108,056.88
Other Assets	43,241.23
	$31,772,186.51

Liabilities.

Capital Stock paid in cash		$4,500,000.00
Due for Return Premiums and Reinsurance		134,091.09
Funds held under Reinsurance Treaties		34,642.78
Due Associated Companies		38,241.34
Reverse for 1921 Taxes and Expenses in Transit		272,112.22
Commissions accrued on uncollected premiums		1,342,891.86
Premium Reserve Computed in Accordance with Requirements of New York Insurance Department	$11,402,618.76	
261		
Reserve for Claims Admitted and not Admitted, all Departments, in accordance with New York Laws	10,251,140.78	
Surplus	4,156,447.68	
		25,450,207.22
		$31,772,186.51

W. GEORGE HYNSON,
Treasurer.

CHAS. O. SCULL,
Vice-President.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 30th day of July, 1921, before me, A. D. Patrick, a Notary Public in and for the City and State aforesaid, personally appeared Chas. O. Scull and W. George Hynson, Vice-President and Treasurer, respectively, of the United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say that they are such officers of the said Company, and that the above and foregoing is a full, true and correct statement of the Assets and Liabilities of the said Company, as they appeared upon the books of the said Company on the 30th day of June, A. D. 1921.

In witness whereof, I have hereunto set my hand and official seal, the day and year aforesaid.

[Notarial Seal.] A. D. PATRICK,
Notary Public.

262 STATE OF NEW JERSEY,
County of Essex, ss:

On this seventeenth day of January, Nineteen Hundred and twenty-two, before me, the subscriber, personally came Charles Vollherbst, who, being by me duly sworn, on his oath says that he is one of the attorneys-in-fact of the United States Fidelity and Guaranty Company, a corporation of the State of Maryland; that he resides in the City of Newark; that he knows John B. Geyler, the attorney-in-fact of the said United States Fidelity and Guaranty Company, signing the foregoing bond for the said Company; that he knows also the corporate seal of said Company; that the seal affixed to the foregoing instrument is such corporate seal and was so affixed by the said attorney-in-fact; that the said instrument was signed by the said attorney-in-fact and attested by deponent as one of the attorneys-in-fact of said Company; by order of the Board of Trustees of said Company, in deponent's presence, as the voluntary act and deed of said Company; that the said Company has duly complied with all the requirements of Chapter 134 of *of* the laws of the State of New Jersey of the year 1902; that the good and available assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said chapter; that the said United States Fidelity and Guaranty Company is duly incorporated under the laws of the State of Maryland and is authorized by the laws of said State and under its charter to become surety on
263 bonds and obligations such as are mentioned in said chapter; that it has on deposit with the Treasurer of the State of Maryland Three Hundred Thousand Dollars in good securities, worth at par value at least that sum, and held for the benefit of the holders of the obligations of said Company; and deponent further says that the said Company has appointed Walter C. Schryver and John B. Geyler, its attorneys-in-fact, in the City of Newark; that said appointment was made by a certain power of attorney, of which the following is a true copy:

Power of Attorney.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint Walter C. Schryver and John B. Geyler, of the City of Newark, State of New Jersey, its true and lawful attorneys in and for the State of New Jersey, for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and

all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors,
264 hereby ratifies and confirms all and whatsoever either the said Walter C. Schryver or the said John B. Geyler may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company, has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 21st day of May, A. D. 1914.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
(Sig.) By W. W. SYMINGTON,
Vice-President.
[SEAL.] (Sig.) WM. T. MORGAN,
Assistant Secretary.

STATE OF MARYLAND,
Baltimore City, ss:

On this 21st day of May, A. D. 1914, before me personally came W. W. Symington, Vice-President of the United States Fidelity and Guaranty Company, and Wm. T. Morgan, Assistant Secretary of said Company, with both of whom I am personally acquainted, who, being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said W. W. Symington and Wm. T. Morgan, were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty
265 Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively, of said Company.

My commission expires the first Monday in May, A. D. 1916.

[SEAL.] (Sig.) WILLIAM J. McFEELY, JR.,
Notary Public.

STATE OF MARYLAND,
Baltimore City, sct:

I, Stephen C. Little, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that William J. McFeeley, Jr., Esq., before whom the annexed affidavits were made, and who has thereto subscribed his name, was, at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and

authorized by law to administer oaths and take acknowledgments or proofs of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

266 In testimony whereof, I hereunto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 21st day of May, A. D. 1914.

[SEAL.] (Sig.) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

Copy of Resolution.

That whereas, it is necessary for the effectual transaction of business that this Company appoints agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland

Therefore be it resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

267 Also in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States, or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded, for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or on any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company,
268 of which resolutions the foregoing is a true copy and of the whole thereof.

In testimony whereof, I hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 21st day of May, A. D. 1914.

[SEAL.] (Sig.) WM. T. MORGAN,
Assistant Secretary.
CHARLES VOLLHERBST.

Sworn and subscribed to before me this 17th day of January, A. D. 1922.

WALTER C. SCHRYVER,
Notary Public of New Jersey.

The within undertaking is approved as to form and as to the sufficiency of the surety.

JOHN RELLSTAB,
Judge.

Due service of copy of within bond and of the approval thereof hereby admitted 19th day of January, 1922.

ELMER H. GERAN,
Solicitor for Thomas W. Miller, as Custodian.

(Endorsed:) Filed Jan. 19, 1922, at 9 o'clock A. M. George T. Cranmer, Clerk.

269 *Citation.*

United States of America to Thomas W. Miller, as Alien Property Custodian, Greeting:

You are hereby notified that in a certain proceeding in equity in the United States District Court in and for the District of New Jersey wherein Francis P. Garvan, as Alien Property Custodian, was the original complaining petitioner and you have become complaining petitioner by substitution for him as your predecessor in said office as Alien Property Custodian, and wherein the Commercial Trust Company of New Jersey is respondent, an appeal has been allowed to the said respondent Commercial Trust Company of New Jersey from the decree therein entered in said District Court on the 10th day of January, 1922, awarding relief to you against said Commercial Trust Company of New Jersey to the United States Circuit Court of Appeals for the Third Circuit.

You are hereby cited and admonished to be and appear in said Circuit Court of Appeals of the United States for the Third Circuit at the Court House thereof in the City of Philadelphia in the State of Pennsylvania, thirty days after the date of this citation, to show cause, if any there be, why the order and decree so appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Hon. John Rellstab, Judge of the United States District Court for the District of New Jersey this 19th day of January, A. D. 1922.

JOHN RELLSTAB,
United States District Judge.

(Endorsed:) Filed Jan. 19, 1922, at 9 o'clock A. M. George T. Cranmer, Clerk.

270 *Docket Entries.*

United States District Court, District of New Jersey.

In Equity.

Case No. 2652.

THOMAS W. MILLER, as Alien Property Custodian,

vs.

COMMERCIAL TRUST COMPANY OF NEW JERSEY.

Sept. 11,	1920.	Petition filed.
" "	"	Rule to show Cause why property &c. should not be delivered &c. filed.
" 20,	"	Affidavit of Service of Petition and Rule filed.
Oct. 19,	"	Answer filed.
Feb. 21,	1921.	Appearance of Selden Bacon, Solr. for Frederick Wesche, Intervenor, filed.
" "	"	Appearance of Selden Bacon Solr. for Chas. J. Ahrenfeldt, filed.
" "	"	Amended Answer of Commercial Trust Co. filed.
" "	"	Hearing on motion for leave to intervene.
" "	"	Hearing on Order to Show Cause why certain moneys and securities should not be turned over to Alien Property Custodian, Decision reserved.

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Oct. 22,	"	Petition of Frederick Wesche for leave to Intervene filed.
" "	"	Petition of Chas. J. Ahrenfeldt, for leave to Intervene, filed.
" "	"	Opinion filed.
" "	"	Memorandum filed.

Jan. 16, 1922. Order for Substitution of Alien Property Custodian filed.
" " " Order denying Application of Frederick Wesche for leave to Intervene, filed.
" " " Order denying Application of Chas. J. Ahrenfeldt for leave to Intervene filed.
" " " Order denying motion to strike out Amended Answer filed.
" 19, " Final Decree for Complainant, filed.
" " " Assignments of Error by Frederick Wesche, filed.
" " " Petition for Appeal and Order allowing Appeal, filed.
" " " Bond on Appeal filed.
" " " Citation issued.
" " " Citation returned, Service acknowledged. Copy filed.
" " " Assignments of Error by Chas. J. Ahrenfeldt, filed.
" " " Petition for Appeal and Order allowing Appeal, filed.
" " " Bond on Appeal filed.
" " " Citation issued.
" " " Citation returned, service acknowledged. Copy filed.

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" " " Assignments of Error by Commercial Trust Co. filed.
" " " Petition for Appeal and Order allowing Appeal, filed.
" " " Bond on Appeal filed.
" " " Citation issued.
" " " Citation returned, service acknowledged. Copy filed.
" 27, " Statement of all evidence and Proceedings at Hearing, filed.
" " " Præcipe for Record on Appeal of Frederick Wesche, filed.
" " " Præcipe for Record on Appeal of Chas. J. Ahrenfeldt, filed.
" " " Præcipe for Record on Appeal of Commercial Trust Co. of N. J. filed.

273 *Præcipe for Record on Appeal.*

District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of THOMAS W. MILLER, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thurigen, Germany, an Enemy.

Præcipe for Record on Appeal of Commercial Trust Company of New Jersey.

SIR:

Please take notice that the Commercial Trust Company of New Jersey, the appellant herein to the United States Circuit Court of Appeals for the Third Circuit, hereby indicates the following portion of the record in the case of Thomas W. Miller as Alien
274 Property Custodian against Commercial Trust Company of New Jersey, respondent, to be incorporated into the transcript on such appeal:

1. Petition of Francis P. Garvan as Alien Property Custodian, filed September 11, 1920;

2. Rule to show cause thereon, issued and filed September 11, 1920;

3. Amended answer of Commercial Trust Company of New Jersey, filed by leave of Court on February 21, 1921;

4. Appearance of Selden Bacon as solicitor for Frederick Wesche, petitioner for intervention;

5. Petition of Frederick Wesche for leave to intervene and proposed answer of said Frederick Wesche;

6. Appearance of Selden Bacon as solicitor for Charles J. Ahrenfeldt;

7. Petition of Charles J. Ahrenfeldt for leave to intervene and proposed answer of said Charles J. Ahrenfeldt;

8. Statement of evidence and proceedings at the hearings on the cause (to be settled).

9. Opinion of Judge Rellstab filed October 22, 1921, on applications of Frederick Wesche and Charles J. Ahrenfeldt for leave to intervene;

275 10. Opinion by Judge Rellstab filed October 22, 1921, on the main case of the Alien Property Custodian against the Commercial Trust Company of New Jersey;

11. Order filed January 16, 1922, substituting Thomas W. Miller as Alien Property Custodian for Francis P. Garvan as Alien Property Custodian as petitioner herein;

12. Order denying petition of Frederick Wesche for leave to intervene.

13. Order denying petition of Charles J. Ahrenfeldt for leave to intervene;

14. Order denying motion of the Alien Property Custodian to strike out the amended answer of the Commercial Trust Company of New Jersey;

15. Final decree for the petitioner Thomas W. Miller as Alien Property Custodian against the Commercial Trust Company of New Jersey;

16. Assignments of error by The Commercial Trust Company of New Jersey, filed January 19, 1922;

17. Petition for appeal by the Commercial Trust Co. and order allowing such appeal, filed January 19, 1922.

18. Bond on appeal of said Commercial Trust Company and surety, filed January 19, 1922, and approving thereof:

276 19. Citation on such appeal to the United States Circuit Court of Appeals, and admission of service thereof, filed January 19, 1922;

20. Transcript of the docket entries in the office of the Clerk of the District Court in the above proceeding.

21. This præcipe, including in each instance any file marks on such documents.

Yours respectfully,

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By FISK & FISK,
Its Solicitors.

To Elmer H. Geran, Esq., Solicitor for Thomas W. Miller, Alien Property Custodian, Appellee, Trenton, New Jersey.

Service acknowledged Jan. 25, 1922.

ELMER H. GERAN,
U. S. Atty.

Endorsed: Filed Jan. 27, 1922 at 9 o'clock A. M. George T. Cranmer, Clerk.

277 *Stipulation of Record.*

District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of THOMAS W. MILLER, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thurigen, Germany, an Enemy.

It is hereby stipulated and agreed, that the foregoing is a true, correct and complete transcript of the record of the said District Court in the above-entitled matter as agreed on by both parties.

Dated, February 14, 1922.

FISK & FISK,
Solicitors for Commercial Trust Company of New Jersey, Appellant.
ELMER H. GERAN,
U. S. Atty.,
By FREDERIC M. P. PEARSE,
Solicitor for Thomas W. Miller, as Alien Property Custodian, Appellee.

278 *Certification of Record.*

District Court of the United States for the District of New Jersey.

In Equity.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner,

against

COMMERCIAL TRUST COMPANY OF NEW JERSEY, a Corporation, Respondent.

In the Matter of the Application of THOMAS W. MILLER, as Alien Property Custodian, In re Certain Stocks, Bonds, Securities, and Money Alleged to be Held by This Respondent as the Money and Property of Helene J. von Schierholz, of Thurigen, Germany, an Enemy.

I, George T. Cranmer, Clerk of the District Court of the United States of America for the District of New Jersey, do hereby Certify that the foregoing is a transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

279 In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Trenton, in the District of New Jersey, this 28 day of February, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

[Seal of the District Court.]

GEORGE T. CRANMER,
Clerk,
By CHARLES S. CHEVRIER,
Deputy.

280 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1922.

No. 2842 (List No. 37).

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Respondent-Appellant,

vs.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner-Appellee.

And afterwards, to wit, on the 3rd and 4th days of May, 1922, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. Victor B. Woolley, and Hon. J. Warren

Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 1st day of August, 1922, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

281 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1922.

No. 2842.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Respondent-Appellant,

vs.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner-Appellee.

On Appeal from the District Court of the United States for the District of New Jersey.

Before Buffington, Woolley, and Davis, Circuit Judges.

WOOLLEY, *Circuit Judge:*

This is a suit brought by the Alien Property Custodian under the Trading with the Enemy Act, October 6, 1917, c. 106, S. 17, 40 Stat. 411, 425, to obtain possession of securities and money belonging to an alien enemy in the hands of the Central Trust Company of New Jersey, as trustee.

The Trust Company, in compliance with the provisions of the Act, made a report in December 1917 that it held stocks, bonds, mortgages, securities and money, of the value of about $600,000, in trust, as to both principal and interest, for the joint account of Frederick Wesche, of Paris, France, and Helene J. von Schierholz, of Plaue, Germany, to be delivered and paid to either upon his or her sole demand, or to the survivor.

282 Upon investigation the Alien Property Custodian determined that Wesche was a neutral and von Schierholz an alien enemy not holding a license from the President, and demanded surrender of the securities. Because the neutral had power upon his sole order to withdraw the whole property, the Trust Company thought the Alien Property Custodian had no right to it and accordingly declined to yield possession. Because the alien enemy had like power upon her sole order to withdraw the whole property and acquire its possession, the Alien Property Custodian throught he had a right to it and accordingly demanded it. The question is, which was right?

The District Court entered a decree for the Alien Property Custodian and the Trust Company took this appeal.

Although the appellant filed eighty-three assignments of error, raising seventy-one questions, we are of opinion that the appellant brings here for review but the one question we have stated. This question, admittedly, has several phases, the most of which we think have already been decided by the Supreme Court in Central Union Trust Co. vs. Garvan, 254 U. S. 554 and Stoehr vs. Wallace, 255 U. S. 239. In this case, as was done in the cases cited, the appellant attacks the proceeding as one purely possessory in character and challenges the constitutionality of the Trading with the Enemy Act. Again in this case, as happened in the others, the appellant claims the right to have property interests judicially determined by a court of equity before a right to the possession of the property can be asserted by the Alien Property Custodian. Differing from the cases cited, the appellant here maintains, as a matter of fact, that there was no investigation and determination by the Alien Property Custodian that von Schierholz was an alien enemy, and, whether or not there was such an investigation and determination, it maintains, as a matter of law, that the Trading with the Enemy Act ceased to be operative after armistice on November 11, 1918, or after the Peace Resolution passed by the Congress on July 2, 1921, or finally after the exchange of ratifications of the Treaty with Germany of August 25, 1921. Relying upon the two cases cited, it is clear the Supreme Court has decided that the Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, c. 106, 40 Stat. 411, or as since amended, March 28, 1918, c. 28, 40 Stat. 459, 460; November 4, 1918, c. 201, 40 Stat. 1020; July 11, 1919, c. 6, 41
283 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977, is strictly a war measure, finding its sanction in the constitutional provision, Art. 1, s. 8, cl. 11, empowering the Congress "to declare war, grant letters of marque and reprisal, and make rules concerning capture on land and water." Brown v. United States, 8 Cranch, 110, 126; Miller v. United States, 11 Wall., 268, 305. Under these broad powers, the Act providing for seizure and sequestration through executive channels of property "believed" to be enemy-owned has been held constitutional because of the adequate provisions made by the Act for a return of the property in case of mistake; and because of these provisions—which fully meet the due process of law guarantee—the Supreme Court has held that enemy ownership need not be judicially determined before the property can be seized. The action by the Alien Property Custodian brought in a District Court to enforce his demand for property, which after investigation he has determined to be enemy-owned, is held, therefore, to be a purely possessory action, leaving the party claiming title to a subsequent suit. Grant Timber & Mfg. Co. vs. Gray, 236 U. S. 133. We find no irregular or insufficient action on the part of the Alien Property Custodian in the demand, investigation and determination prescribed by the Act and agree with the District Court that, the property in question being held for the joint account of a neutral and an alien enemy, and being in our aspect under the sole control of the alien enemy as to *is* withdrawal, possession and dispos-tion, it was properly regarded, in this initial proceeding, as enemy-owned property

liable to seizure by the Alien Property Custodian. Therefore, neither for itself as trustee nor for either cestui que trust was the Trust Company justified in withholding a delivery of the property under the Act as it was passed and amended. Nor do we think that the Act as passed and amended has been repealed or otherwise affected by the armistice, the Peace Resolution of Congress, or the Treaty with Germany. While hostilities ceased and peace was reestablished by some one of these events, the Act, not containing self-limiting terms and not being expressly repealed, remains the law. The decree of the District Court by which the law, as applied to this case, is enforced, must therefore be Affirmed.

Endorsed: No. 2842. Opinion of the Court, by Woolley, J. Received & Filed August 1st, 1922. Saunders Lewis, Jr., Clerk.

284 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1922.

No. 2842 (List No. 37).

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Respondent-Appellant,

vs.

THOMAS W. MILLER, as Alien Property Custodian, Petitioner-Appellee.

Appeal from the District Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

VICTOR B. WOOLLEY,
Circuit Judge.

Philadelphia, August 1st, 1922.

Endorsed: No. 2842. Order Affirming Decree. Received & Filed August 1st, 1922. Saunders Lewis, Jr., Clerk.

285 United States Circuit Court of Appeals for the Third Circuit.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, Appellee.

Assignment of Errors.

The appellant in the above entitled cause, in connection with its petition for appeal herein, presents and files therewith its assignment of errors, as to which matters and things it says that the decree entered herein on the 1st day of August, 1922, is erroneous and that it will urge the said matters and things before the Supreme Court of the United States, to wit:

1. The Court erred in making the order and decree appealed from directing this respondent to forthwith account for, convey, transfer, assign, deliver and pay to Thomas W. Miller as Alien Property Custodian the money and other property described and set forth in the petition herein and in the amended answer, with any accretions thereon or changes therein.

2. The court erred in making the order and decree appealed from for such order and decree is in conflict with the provisions of the Fourth and Fifth Amendments to the Constitution of the United States prohibiting unreasonable seizures and prohibiting deprivation of property without due process of law and prohibiting the taking of private property for public use without just compensa-
286 tion and is not within the provisions of any rules authorized to be made by Congress concerning captures on land or water by the provisions of Section 7 of Article I of the Constitution of the United States.

3. The Court erred in overruling this respondent's objections to the demand, Exhibit B of the petition, that it turn over to the Custodian the property therein described.

4. The Court erred in overruling this respondent's objections to the demand, Exhibit C of the petition, that it turn over to the Custodian the property therein described.

5. The Court erred in holding that the statement in the demand, Exhibit B of the petition, that the Custodian Palmer had determined the ownership of the property in question after investigation, precluded inquiry in the present proceeding as to whether the investigation required by law had been made by the Custodian prior to such determination.

6. The Court erred in holding that the statement in the demand, Exhibit C of the petition, that the Custodian Garvan had determined the ownership of the property in question after investigation, precluded inquiry in the present proceeding as to whether the investi-

gation required by law had been made by the Custodian prior to such determination.

7. The Court erred in holding that the annexing of the document Exhibit B to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership of the property in that document described after investigation.

287 8. The Court erred in holding that the annexing of the document Exhibit C to the petition of the Custodian was equivalent to an allegation that the Custodian had determined the ownership of the property in that document described after investigation.

9. The Court erred in holding that an admission that the manner of deposit with this respondent of the property in question, when it was admitted that severable parts thereof were not and had not been owned by an enemy or ally of enemy was equivalent to a determination of ownership thereof by the Custodian after investigation, and could take the place thereof.

10. The Court erred in holding that the present proceeding is merely possessory in character.

11. The Court erred in holding that the making of the determination specified in Exhibit B was not disputed.

12. The Court erred in holding that the making of the determination specified in Exhibit C was not disputed.

13. The Court erred in holding that the statement in Exhibit B that investigation of the ownership of the property was made before determination thereof adequately met the admission made in open court of the allegations concerning such determination and investigation contained in the amended answer.

14. The Court erred in holding that the statement in Exhibit C that investigation of the ownership of the property was made before determination thereof adequately met the admission made in open court of the allegations concerning such determination and investigation contained in the amended answer.

288 15. The Court erred in holding that the Alien Property Custodian could lawfully in this proceeding assert greater rights over the property in question in the right of Mrs. von Schierholz than Mrs. von Schierholz could lawfully have done in the absence of war, in her own right.

16. The Court erred in holding that the property of persons other than enemies is the subject of capture, when not in actual hostile use against the United States, or within a region where active hostilities are being conducted.

17. The Court erred in holding that property, several identifiable parts of which were owned by citizens or neutrals in severalty, and

only a severable part by enemies, was subject to capture as a single item of property.

18. The Court erred in holding that a deposit of property, made years before the war was declared in the joint names of an enemy and a neutral, with stated power to either to withdraw it, was subject to capture, by virtue of that fact alone, as enemy property in its entirety, irrespective of the actual ownership of the several parts thereof, and of the several individual personal ownership by such neutral of a several part thereof, without prior investigation of the real ownership by the Custodian.

19. The Court erred in holding that where personal property had been deposited with a bailee, under an ante-bellum contract running to an enemy and a neutral with express power to either to withdraw the property from deposit, such fact alone after the declaration of war, irrespective of notice of the real ownership of the prop-
289 erty by persons not enemies, justified a determination that the property was held for an enemy.

20. The Court erred in holding that on the report alone Exhibit A of the petition, the Alien Property Custodian could justly determine that the properties in question were all held for an enemy, without other investigation.

21. The Court erred in holding that an amendment of the Trading with the Enemy Act, enacted by Congress subsequent to the making of both the demands set up in the petition, as Exhibits B and C thereof, could cure a constitutional invalidity of the Trading with the Enemy Act as it existed at the time the said demands severally were made, and validate such prior demands and pretended determinations, without a new determination and demand made by the Alien Property Custodian according to law after the passage of such amendment; and in holding that such amendment could constitutionally have such effect in spite of the provisions of the V Amendment to the United States Constitution.

22. The Court erred in holding that after the declaration of war by the United States on April 6, 1917, the Trust Company had any power or authority to deliver the property in question (other than so much thereof as was individually owned by her) to Helene von Schierholz by virtue of the terms of the agreement of deposit.

23. The Court erred in holding that the Trust Company's report showed that under the trust agreement Mrs. von Schierholz at any time after April 6, 1917, had a right to demand of the Trust Company that the moneys or securities in question or any thereof
290 be turned over to her, other than such as were her individual several property.

24. The Court erred in holding that a determination of ownership of property by the Custodian, made without evidence to support it, with notice that it was contrary to the real ownership, with notice where exact evidence of the ownership could be obtained, and made

without inquiry and without investigation of the real ownership, and in fraud of the rights of the real owner, prevents any resistance to or questioning of such determination in a court of equity by such owner or his bailee in possession of the property when the Custodian appeals to such a court for its aid in securing delivery of the property to him.

25. The Court erred in holding that a Court of Equity should order property turned over to the Alien Property Custodian that he on the conceded facts had no lawful right to hold.

26. The Court erred in holding that a Court of Equity should order the property in question, or any thereof, turned over to the Alien Property Custodian as the property of Mrs. von Schierholz, when he was by law required to return to her any property of hers seized by him, even without prior application by her, under and by virtue of the provisions of Section 9 of the Trading with the Enemy Act, Subdivisions *b*)3 and *b*)8 as amended by the Acts of Congress of June 5, 1920 and February 27th, 1921, she having admittedly been born a citizen of the United States, and having lost her citizenship solely by her marriage to a German subject prior to 1914, and having derived whatever rights of ownership she had in the
291 property from her father, an American citizen, and having acquired whatever rights or powers or interests she had therein long prior to August 1st, 1914.

27. The Court erred in refusing to consider any of the objections specified in and by the amended answer of the Commercial Trust Company of New Jersey other than those mentioned in its opinion.

28. The Court erred in refusing to find that at the time of each of the demands set forth in the petition as Exhibits B and C thereof respectively the provisions of Section 7 of the Trading with the Enemy Act were unconstitutional and invalid so far as they authorized the seizure by the Custodian of property of American citizens not resident in any Judicial District of the United States and not enemies, or of neutrals not resident within any judicial district of the United States, such as Charles J. Ahrenfeldt and Frederick Wesche were respectively admitted to be.

29. The Court erred in refusing to hold the demands set forth in the petition as Exhibit B thereof void, as not constituting due process of law.

30. The Court erred in refusing to hold the demands set forth in the petition as Exhibit C thereof void, as not constituting due process of law.

30*a*. The Court erred in failing to hold the provisions of the Trading with the Enemy Act, authorizing seizure by the Alien Property Custodian of money or property not belonging to enemies or allies of enemies and aid of the Courts in securing delivery of such property to him, unconstitutional in the absence of provision

for payment of either interest or damages for the period of detention of such property before return.

292 31. The Court erred in holding that amendment of the Trading with the Enemy Act in July 1919 after the demands made and after any pretended determination of ownership of the property in question (whether with or without prior investigation) but prior to the institution of this equity proceeding could constitutionally cure any invalidity in those demands and pretended determinations, and bar all inquiry by a Court of Equity, upon the petition of the Custodian herein filed, into the real ownership of the property, and conclusively require and authorize award of the possession of the property in question to the Alien Property Custodian on the petition herein, which contains no allegation of any determination of the ownership by the Alien Property Custodian subsequent to the enactment of such amendment, and especially when the Alien Property Custodian admitted in open Court upon the hearing that all the allegations of the amended answer as to the ownership of the property were true.

32. The Court erred in holding that the Trust Company would be fully protected on a compliance with the Custodian's demands, Exhibits B and C of the original petition herein.

33. The Court erred in holding that the question whether Wesche or any other person other than Mrs. von Schierholz has any title or interest in these moneys or securities can be raised only by filing a claim and instituting proceedings as provided by Section 9 of the Trading with the Enemy Act.

34. The Court erred in holding that a Court of Equity cannot, in a proceeding like the present, consider the rights of those against whom relief is sought as a condition of granting relief to the petitioner.

293 35. The Court erred in holding that a Court of Equity can entertain a purely possessory proceeding without regard to the equities and rights of the parties before it.

36. The Court erred in holding that the Alien Property Custodian did not, by applying to a Court of Equity for relief, waive the right to obtain possessory award otherwise than upon equitable considerations and conditions.

37. The Court erred in failing to hold that the admission on the record of the truth of the allegations of the amended answer as to the ownership of the property therein mentioned was the first determination of the ownership thereof made by any Enemy property Custodian after investigation.

38. The Court erred in failing to hold that the admission by the Alien Property Custodian made in open court that the property in question all was and had been owned as stated in the amended

answer herein, was a determination by the Alien Property Custodian, made after investigation, which superseded all prior pretended determinations by the Custodians or either of them.

39. The Court erred in holding that the petitioner is entitled to relief from this equity court without meeting the requirements of equity as to doing equity.

40. The Court erred in holding that it would direct a delivery to the Custodian as successor to the right of Mrs. von Schierholz, which it would have been a breach of trust for her to demand.

294 41. The Court erred in failing to hold that the petition (by petitioning in equity and proceeding by order that the respondent show cause if any there be why the property should not be turned over and assigned to the Custodian, and by omitting from his petition any allegations that he had, after investigation thereof, determined the ownership of the property in question) had sought a determination by the Court of the ownership of the property after its hearing the evidence concerning such ownership, and had given to the respondent the right to present the evidence of real ownership and to have a determination by the Court accordingly.

42. The Court erred in holding that the relief given by it to the Alien Property Custodian was not in conflict with the provisions of the V Amendment to the constitution providing that no person shall be deprived of property without due process of law.

43. The Court erred in holding that the Trading with the Enemy Act, in so far as it authorized seizure of private property not in use in hostility to the United States and not within any area of actual hostilities, belonging to persons not enemies of the United States, but who did not reside in any judicial district of the United States, was, prior to July 11th, 1919, constitutional and valid.

44. The Court erred in holding that it would give its assistance to the Alien Property Custodian by requiring any property to be turned over to him as the property of Mrs. von Schierholz at a time when surrender to her by him, even without prior application by her, of all property belonging to her, was provided for by law.

295 45. The Court erred in failing to hold that the petitioner had not alleged that any determination of the ownership of the property had been made by either Alien Property Custodian after investigation.

46. The Court erred in holding the petition sufficient to entitle the petitioner to relief otherwise than in accordance with the actual ownership of the property, as alleged in the amended answer and admitted on the hearing, when the petition contained no allegation that either Custodian had, after investigation, determined the ownership to be otherwise.

47. The Court erred in holding that the owners of parts of the property in question who were not enemies, Mr. Ahrenfeldt and Mr. Wesche could be deprived of their property without due process of law.

48. The Court erred in holding that the demand of the Alien Property Custodian Palmer, Exhibit B of the original petition constituted due process of law.

49. The Court erred in holding that the demand of the Alien Property Custodian Garvan, Exhibit C of the original petition, constituted due process of law.

50. The Court erred in holding that a purely possessory proceeding could be maintained by the Alien Property Custodian under the provisions of the Trading with the Enemy Act and the amendments thereof to obtain possession of property not actually belonging to an enemy or ally of enemy and not in use in hostility to the United States in the absence of an actual determination (after investigation) by the custodian, authorized by law at the time it was made, of the ownership of such property, on the ground that the Custodian might have made such a determination on the papers submitted to him.

296 51. The Court erred in holding that the Custodian could dispense with the duty of investigation, before determination by him of ownership of property under the provisions of the Trading with the Enemy Act, and in holding that the Trading with the Enemy Act so construed was constitutional in so far as it authorized capture of property not owned by an enemy or ally of enemy and not in actual hostile use against the United States or within a region where hostilities were being actively conducted, and that it was not so construed, in such cases in conflict with the provisions of either the IV or V Amendments to the United States Constitution.

52. The Court erred in holding that a Court of Equity was bound to exercise its special powers in favor of the Alien Property Custodian without regard to the real and equitable rights of this respondent and those whose rights it here represented.

53. The Court erred in holding constitutional and valid the provisions of the Trading with the Enemy Act which authorize seizure by the Custodian of private property belonging to persons not enemies or allies of enemies and which was not in actual military use against the United States or within any area of Actual hostilities.

54. The Court erred in directing delivery to the Alien Property Custodian of any property admittedly belonging at all times after January 1st, 1914, to Frederick Wesche, who was admittedly never an enemy.

55. The Court erred in directing delivery to the Alien Property Custodian of any property admittedly belonging at all times after January 1st, 1914 to Charles J. Ahrenfeldt, who was admittedly never an enemy.

297 56. The Court erred in directing delivery to the Alien Property Custodian in this proceeding of any property which was admittedly not the property of Helene J. von Schierholz and had not been.

57. The Court erred in holding that the demand Exhibit B of the petition was a lawful exercise of the right of capture under Clause 11 of Section 8 of Article I of the Constitution of the United States.

58. The Court erred in holding that the demand Exhibit C of the petition was a lawful exercise of the right of capture under Clause 11 of Section 8 of Article I of the Constitution of the United States.

59. The Court erred in holding that the provisions of Section 7 of the Trading with the Enemy Act, prior to the amendment of July 11th, 1919, were, so far as they authorized the seizure or capture of property belonging to persons not enemies or allies of enemies of the United States and not resident within any judicial district of the United States, a valid exercise of the power "to make rules concerning captures on land and water" conferred by Clause 11 of Section 8 of Article I of the Constitution of the United States, and not in conflict with the prohibitions contained in the IV and V Amendments to the Constitution of the United States.

60. The Court erred in holding that the Act of Congress of July 11th, 1919, could constitutionally (and in disregard of the V Amendment of the Constitution of the United States) operate, retroactively, to validate provisions of the Trading with the Enemy Act of October 6th, 1917, unconstitutional when adopted, as of a time prior to the enactment of such amendment and to validate acts attempted to be done under such unconstitutional provisions
298 prior to the enactment of such Act of July 11th, 1919.

61. The Court erred in holding that the right of capture, in the case of property owned in severalty, part by one not an enemy or ally of enemy of the United States, and part by an enemy, could extend beyond the part or share belonging to the enemy.

62. The Court erred in holding the Trading with the Enemy Act constitutional in so far as it permitted capture of property on land not belonging to an enemy or ally of enemy, and not in use against the United States, and not within any region in which hostilities were being actively conducted.

63. The Court erred in ruling that after April 6th, 1917, under the trust agreement either Mrs. von Schierholz or Mr. Wesche could demand the possession of the properties therein covered.

64. The Court erred in holding that it was the duty of the Trust Company to comply with the demands of the Alien Property Custodian and turn over all the property demanded to him.

65. The Court erred in holding that the question of other persons' ownership or interest in the properties demanded was irrelevant in this proceeding.

66. The Court erred in holding that the questions arising out of the various rights in and to the property can be raised only after the demands of the Alien Property Custodian have been complied with, and by instituting proceedings authorized by Section 9 of the Trading with the Enemy Act as amended.

67. The Court erred in awarding custody of the property or any thereof as the property of Helene von Schierholz to the Alien
299 Property Custodian after the enactment of the Act of Congress of February 27th, 1921, amending the Trading with the Enemy Act.

68. The Court erred in holding that, after the passage of the joint resolution of Congress declaring the state of war between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, the Enemy Property Custodian had any power, right or authority to reduce to his possession as such Custodian by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such Custodian, other than property actually belonging to the Imperial German Government, or its successor or successors or to German Nationals.

69. The Court erred in holding that after the signature and ratification of the treaty with Germany of date August 25th, 1921, and the exchange of ratifications thereof between the two governments, the Enemy Property Custodian had any power, right or authority to reduce to his posses-ion as such Custodian, by virtue of the Trading with the Enemy Act and any amendments thereof, any property previously demanded by him as that of Germans, but not actually previously delivered into his possession as such Custodian, other than property actually belonging to the Imperial German Government, its successor or successors, or to German Nationals.

70. The Court erred in failing to hold that after the passage of the joint resolution of Congress declaring the State of War between the Imperial German Government and the United States of America at an end and its approval and signature by the President of the United States on July 2nd, 1921, and the proclamation of peace by the President of the United States, and the signature and ratification of the treaty of peace between the United States and Germany
300 of date August 25th, 1921, and the exchange of ratifications of such treaty, the Alien Property Custodian could not by virtue of determination of enemy ownership of property by him and demand thereof accordingly maintain any possessory proceeding by virtue of the Trading with the Enemy Act, and the amendments thereof, to reduce to his possession as Alien Property Custodian any property, so previously demanded by him as property of German enemies of the United States, unless such property had actually

belonged either to the Imperial German Government, or its successor or succes-ors, or to German Nationals.

71. The Court erred in failing to hold that upon the termination of the war all right of capture under the provisions of the Trading with the Enemy Act and all right of completing capture attempted by demand of the property but not theretofore completed by actual reduction of the property to possession by the Custodian ceased and determined, save and except only as to such property as was specifically excepted by the terms of the peace resolution of July 2nd, 1921 and by those of the treaty of peace with Germany of August 25th, 1921, namely, all property of the Imperial German Government, or its successor or successors, and of all German Nationals which had been the subject of a demand, and all property of the Imperial and Royal Austro-Hungarian government or its successor or successors and of all Austro-Hungarian Nationals, which had been the subject of such demand; and in failing to hold that, it appearing that part of the property herein sought to be recovered was not of such excepted character, no possession could be herein awarded to the Custodian of such property which did not and had not belonged to said Governments or any of them or to German or Austro-Hungarian Nationals.

301 72. The Court erred in refusing to hold that the amendment of the Trading with the Enemy Act by the Act of July 11th, 1919 (as construed by it, as validating determinations and demands made by the Custodian prior to the enactment of such amendment as to which the provisions of the Trading with the Enemy Act as previously existent were unconstitutional) was invalid and unconstitutional, as in conflict respectively with the provisions of the Constitution of the United States, to wit, those of the Fifth Amendment of the Constitution of the United States, forbidding that any person be deprived of property without due process of law, and those forbidding the taking of private property for public use without just compensation and in conflict with the provisions of the Fourth Amendment to the Constitution of the United States forbidding unreasonable seizures.

73. The Court erred in holding that this proceeding was a possessory one, when the demands Exhibits A and B of the original petition were both void because made under a statute which was unconstitutional at the time they were made, as to the owners of parts of the property involved, to wit, Frederick Wesche a neutral resident at all times since 1914 in Switzerland and Charles J. Ahrenfeldt, an American citizen resident, at the times when said demands were each made and since, outside of the United States in London, England and in Switzerland, as providing for seizure of property of persons not enemies without due process of law.

74. The Court erred in holding that a capture by the Custodian was completely effected of the property here in question before the exchange of ratifications of the treaty of peace, by the demands

shown and the institution of this proceeding, without the
302 actual reduction to his possession of the property or any part thereof.

75. The Court erred in holding that the stipulation in the treaty of August 25th, 1921, between the United States and Germany according to the United States the benefit of the provision in the joint resolution of Congress of July 2, 1921, that all property of all German Nationals which had been the subject of a demand by the United States of America or of any of its officers, agents or employees should be retained by the United States of America and no disposition thereof made except as specifically provided by law, was (as construed by the Court as applicable to property of individual German Nationals, which had been merely made the subject of a demand or demands by the Alien Property Custodian without actual reduction to possession or physical capture) constitutional and valid and not within the prohibitions of the V Amendment to the Constitution of the United States.

76. The Court erred in holding that the Joint Resolution of Congress of July 2d, 1921, in so far as it authorized completion of uncompleted captures of private property after the conclusion of peace and the exchange of ratifications of the treaty of August 25th, 1921, was constitutional and valid and not within the provisions of the V Amendment to the Constitution of the United States forbidding that any person shall be deprived of his property without due process of law, and forbidding the taking of private property for public use without just compensation.

77. The Court erred in holding that the Trading with the Enemy Act, and the Amendments thereof, the Joint Resolution of Congress of July 2d, 1921, the Proclamation of Peace by the President
303 of the United States, and the treaty of August 25th, 1921, and the exchange of ratifications thereof, all and severally, were constitutional and not within the prohibitions of the V Amendment to the Constitution of the United States forbidding the taking of private property for public use without just compensation, and forbidding that any person should be deprived of his property without due process of law, as the same were construed by the Court as authorizing completion (as against individual owners), after the conclusion of peace, of captures by the Custodian of private property individually owned, not previously reduced to actual possession by him.

78. The Cournt erred in assisting a capture of individually owned private property by the Custodian after the conclusion of peace.

79. The Court erred in assisting a capture of individual private property, belonging to an American citizen, by the Custodian, after the conclusion of peace.

80. The Court erred in holding that after the conclusion of the treaty of peace the Alien Property Custodian was authorized to prose-

cute any proceeding for the purpose of reducing to his possession property not actually so reduced to possession prior to the conclusion of peace.

81. The Court erred in holding that it had any jurisdiction to entertain in purely possessory proceeding by the Custodian after the conclusion of peace.

82. The Court erred in not denying the petition of the Custodian.

83. The Court erred in failing to hold that the provisions of the Trading with the Enemy Act authorizing purely possessory proceedings by the Alien Property Custodian to recover possession of property which he had required to be delivered to him as enemy property, had become unconstitutional with the termination of the war.

304 84. The Circuit Court of Appeals erred in stating that the one question brought before it was whether the appellant was right in thinking that the Alien Property Custodian had no right to the property because the neutral had power upon his sole order to withdraw the whole property, or the Alien Property Custodian was right in thinking he had a right to it because the alien enemy had like power upon her sole order to withdraw the whole property and acquire its possession.

85. The Circuit Court of Appeals erred in holding that the appellant there maintains that as a matter of fact there was no investigation or determination by the Alien Property Custodian that Mrs. von Schierholz was an alien enemy, whereas what the appellant maintained with regard to lack of investigation and determination was that there was no investigation and determination by the Alien Property Custodian after investigation that Mrs. von Schierholz was the owner of the property.

86. The Circuit Court of Appeals erred in holding that the provisions of the Trading with the Enemy Act as originally enacted and as amended in 1918 for a return of the property in case of mistake fully met the due process of law guarantee of the Constitution.

87. The Circuit Court of Appeals erred in holding that the present proceeding in equity was a purely possessory action.

88. The Circuit Court of Appeals erred in finding that there was no irregular or insufficient action on the part of the Alien Property Custodian in the investigation and determination of the ownership of the property.

305 89. The Circuit Court of Appeals erred in holding that the property in question was under the sole control of the Alien enemy as to its withdrawal, possession and disposition.

90. The Circuit Court of Appeals erred in holding that the property in question being held for the joint account of a neutral and an alien enemy and being under the sole control of an alien enemy as to its withdrawal, possession and disposition, it was properly regarded as

enemy owned property liable to seizure by the Alien Property Custodian.

91. The Circuit Court of Appeals erred in holding that neither for itself as Trustee nor for either cestui que trust was the Trust Company justified in withholding delivery of the property under the Act.

92. The Circuit Court of Appeals erred in holding that the Act as passed and amended had not been repealed or otherwise affected by the armistice, the peace resolution of Congress or the treaty with Germany.

93. The Circuit Court of Appeals erred in holding that while hostilities ceased and peace was re-established by either the armistice, the peace resolution of Congress or the treaty with Germany, the Trading with the Enemy Act by reason of not containing self-limiting terms and not being expressly repealed remains the law.

94. The Circuit Court of Appeals erred in holding that in face of the provisions of the IV Amendment to the Constitution of the United States an order could be made by the Court in such proceeding directing delivery of property to the Alien Property Custodian as to which no probable cause was shown to the Court sup-
306 ported by oath or affirmation to believe it enemy property.

95. The Circuit Court of Appeals erred in affirming the decree of the District Court.

Wherefore, the appellant prays that the said decree of the Circuit Court of Appeals may be reversed and that the appellant may have an adjudication and decree in its favor as herein specified.

Dated August ninth 1922.

FISK & FISK,
Solicitors for Appellant.

15 Exchange Place, Jersey City, N. J.

SELDEN BACON,
43 Exchange Place, New York City;

J. FISHER ANDERSON,
15 Exchange Place, Jersey City, N. J.,
Of Counsel.

Endorsed: No. 2842. Asignment of Errors. Received & Filed August 11th, 1922. Saunders Lewis, Jr., Clerk.

307 United States Circuit Court of Appeals for the Third Circuit.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, Appellee.

To the Honorable Judges of the Circuit Court of Appeals for the Third Circuit:

The above mentioned appellant, Commercial Trust Company of New Jersey, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Third Circuit, and that a judgment therein has been rendered on the 1st day of August, A. D. 1922, affirming the decree of the District Court of the United States for the District of New Jersey, and that the matter in controversy in said suit exceeds $100,000 besides costs; that this cause is not one in which the United States Circuit Court of Appeals for the Third Circuit has final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

And the above named Commercial Trust Company of New Jersey, appellant in the above entitled proceeding, conceiving itself aggrieved by the order and decree of this Court made and entered herein on the 1st day of August, 1922, affirming the decree of the District Court herein does hereby appeal from said order and
308 decree of affirmance and from each and every part thereof to the United States Supreme Court for all and several the reasons specified in its assignment of errors, which is filed herewith.

Wherefore the said appellant prays that an appeal be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And this appellant further prays that upon its giving bond in an amount to be fixed by this Court said appeal may operate as a supersedeas and suspend during the pendency of such appeal, the effect of such decree and order of this Court and this appellant presents herewith, hereto annexed, its agreement to hold the property involved in said proceeding pending such appeal.

Dated August 9th, 1922.

FISK & FISK,
Solicitors for Commercial Trust Company of New Jersey, Appellant and Petitioner for Leave to Appeal.

SELDEN BACON,
J. FISHER ANDERSON,
Of Counsel.

309 The Commercial Trust Company of New Jersey, the petitioner for appeal above named, in consideration of the Court's fixing the amount of supersedeas bond on the appeal within prayed for at $20,000 hereby undertakes and agrees that pending said appeal it will hold the property and money covered by said decree and not deliver the same to any person other than the Alien Property Custodian without the consent and order of this Court or of the Supreme Court.

[SEAL.] COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. S. PERKINS,
V. P.

STATE OF NEW JERSEY,
County of Hudson, ss:

On this 9th day of August, 1922, before me personally came Jay S. Perkins to me personally known and known to me to be one of the Vice Presidents of the Commercial Trust Company of New Jersey, who being by me first duly sworn did depose and say that he resides at Jersey City in the County of Hudson, in the State of New Jersey; that he is a Vice President of said Commercial Trust Company of New Jersey, the corporation described in and which executed the foregoing instrument, that he knows the corporate seal of said corporation; that the seal affixed to the above instru-
310 ment is such corporate seal, that the same was affixed thereto by authority of the Board of Directors of such corporation, and that he signed the same in the corporate name by like authority.

[SEAL.] R'T S. CARMICHAEL,
Notary Public of N. J.

311 The Supreme Court of the United States.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, Appellee.

STATE OF NEW JERSEY,
County of Hudson, ss:

J. Fisher Anderson of the said County, being duly sworn, on his oath says that he is a member of the firm of Fisk & Fisk, the solicitors for the appellant above named in this cause and of counsel therein for the appellant. That he is personally acquainted with the affairs involved in the present suit; that the property sought to be recovered by the appellee exceeds $200,000 in value; that the matters in controversy in this proceeding and the amount therein in controversy exceed the sum of $100,000 exclusive of interest and costs.

J. FISHER ANDERSON.

Subscribed and sworn to before me this 9th day of August, 1922.

[SEAL.] R'T S. CARMICHAEL,
Notary Public of N. J.

Endorsed: No. 2842. Petition for Appeal. Received & Filed August 11th, 1922. Saunders Lewis, Jr., Clerk.

312 United States Circuit Court of Appeals for the Third Circuit.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, Appellee.

And Now, to wit, this 10th day of August 1922, upon consideration of the foregoing petition and annexed agreement, it is, on motion of Fisk & Fisk, solicitors for the Commercial Trust Company of New Jersey, the petitioner for appeal

Ordered by this Court, that the appeal prayed for therein be and the same is hereby allowed to the Commercial Trust Company of New Jersey from the above described decree, and that said appeal shall be returnable to the United States Supreme Court and that upon the execution and filing of a cost and supersedeas bond in the penal sum of $20,000 with a surety to be approved by this Court, said appeal shall operate as a supersedeas of said decree and shall suspend until the final decree on appeal herein the effect of said decree; and that a transcript of the record including all the testimony and proceedings at the trial and the stipulation there made shall be filed in the Supreme Court aforesaid according to law as so prayed for.

313 It is further ordered that said appellant give bond for costs of said appeal in the sum of $500 to perfect the same.

It is further ordered that the property held by said Commercial Trust Company of New Jersey which is the subject of the decree so appealed from shall not pending the appeal and until the final determination thereof be delivered or paid over by said Commercial Trust Company of New Jersey to anyone other than the Alien Property Custodian without the consent and order of this Court or of the Supreme Court.

Dated August 10th, 1922.

J. WARREN DAVIS,
United States Circuit Judge.

Endorsed: No. 2842. Order Allowing Appeal. Received & Filed August 11th, 1922. Saunders Lewis, Jr., Clerk.

314 United States Circuit Court of Appeals for the Third Circuit.

No. 2842.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, Appellee.

Bond on Appeal.

Know all men by these presents:

That we, Commercial Trust Company of New Jersey, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 75 William Street, in the Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto Thomas W. Miller, as Alien Property Custodian, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said Thomas W. Miller, as Alien Property Custodian, his certain attorney, executors, administrators, or assigns, his successor or successors, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 10th day of August, 1922.

Whereas, lately at a term of the United States Circuit Court of Appeals, for the Third Circuit, in a suit pending in said Court, between the said Commercial Trust Company of New Jersey, Appellant, and Thomas W. Miller, as Alien Property Custodian, Ap-
315 pellee, a decree was rendered against the said Commercial Trust Company of New Jersey, and the said Commercial Trust Company of New Jersey, having obtained an order allowing an appeal, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Thomas W. Miller, as Alien Property Custodian, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, therefore, the condition of this obligation is such, that if said Commercial Trust Company of New Jersey shall prosecute its appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation to be void, else to remain in full force and virtue.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. P. PERKINS,
Vice-President.

Signed, Sealed and Delivered in the Presence of:

R. A. CARMICHAEL,
Secretary.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney-in-fact.

Attest:
[SEAL.] WILLIAM H. ESTWICK,
Attorney-in-fact.

Endorsed: No. 2842. Bond for Costs on Appeal. Received & Filed, August 11th, 1922. Saunders Lewis, Jr., Clerk.

316 United States Circuit Court of Appeals for the Third Circuit.

No. 2842.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, Appellee.

Supersedeas Bond.

Know all men by these presents:

That we, Commercial Trust Company of New Jersey, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 75 William Street, in the Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto Thomas W. Miller, as Alien Property Custodian, in the full and just sum of Twenty Thousand ($20,000.00) Dollars, to be paid to the said Thomas W. Miller, as Alien Property Custodian, his certain attorney, executors, administrators, or assigns, successor or successors, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 10th day of August, 1922.

Whereas, lately at a term of the United States Circuit Court of Appeals, for the Third Circuit, in a suit pending in said Court,
317 between the said Commercial Trust Company of New Jersey, Appellant, and Thomas W. Miller, as Alien Property Custodian, Appellee, a decree was rendered against the said Commercial Trust Company of New Jersey, and the said Commercial Trust Company of New Jersey, having obtained an order allowing an appeal, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Thomas W. Miller, as Alien Property Custodian, citing and ad-

monishing it to be and appear at a Supreme Court of the United States, at Washington, within thrity days from the date thereof.

Now, therefore, the condition of this obligation is such, that if said Commercial Trust Company of New Jersey shall prosecute its appeal to effect, and hold the property and money covered by said decree and not deliver the same to any person other than the Alien Property Cu-todian without the consent and order of this Court or of the Supreme Court, and answer all damages and costs if they fail to make their appeal good, then this obligation to be void, else to remain in full force and virtue.

[SEAL.] COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. P. PERKINS,
Vice-President.

Signed, Sealed and Delivered in the Presence of:
R. A. CARMICHAEL,
Secretary.

Endorsed: No. 2842. Bond on Appeal. Received & Filed August 11th, 1922. Saunders Lewis, Jr., Clerk.

318 Copy.

Citation.

United States Circuit Court of Appeals, Third Circuit.

The United States of America to Thomas W. Miller, as Alien Property Custodian:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein Commercial Trust Company of New Jersey is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Hon. J. Warren Davis, Judge of the United States Circuit Court of Appeals for the Third Circuit, this 10th day of August, A. D. 1922.

[SEAL.] J. WARREN DAVIS,
Judge of the United States Circuit Court of Appeals, Third Circuit.

319 United States Circuit Court of Appeals for the Third Circuit.

No. 2842.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, Appellee.

Orwill V. W. Hawkins, being duly sworn, on his oath deposes and says that he is an Attorney at Law of the State of New York and over the age of twenty one years, and is employed in the office of Selden Bacon, one of the Counsel herein, and that on the eleventh day of August, one thousand nine hundred and twenty two he served on the United States Attorney for the District of New Jersey (1) Bond for Costs on Appeal (2) Supersedeas Bond (3) Appellant's Assignment of Errors (4) Citation on Appeal and (5) Petition, Affidavit and Order for Appeal, herein by delivering to and leaving with Henrietta Levy, the person in charge of the office of the United States Attorney for the District of New Jersey at Trenton, New Jersey, said United States Attorney and his Assistants all being absent from said office at said time, true and correct copies of each of said papers, the originals of which are annexed hereto and intended to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Third Circuit together with this affidavit.

O. V. W. HAWKINS.

Subscribed and Sworn to before me this 11th day of August, 1922.
H. R. MANLEY,
United States Commissioner,
Eastern District of Pennsylvania.

Endorsed: No. 2842. Affidavit of Service. Received & Filed August 11th, 1922. Saunders Lewis, Jr., Clerk.

320 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of Commercial Trust Company of New Jersey, Respondent-Appellant, vs. Thomas W. Miller, as Alien Property Custodian, Petitioner-Appellee, on file and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this First day of September in the year of our Lord one thousand nine hundred and

Twenty-two and of the Independence of the United States the one hundred and Forty-seventh.

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

321 & 322 United States Circuit Court of Appeals, Third Circuit.

The United States of America to Thomas W. Miller, as Alien Property Custodian:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein Commercial Trust Company of New Jersey is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Hon. J. Warren Davis Judge of the United States Circuit Court of Appeals for the Third Circuit, this 10th day of August, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

J. WARREN DAVIS,
Judge of the United States Circuit Court of Appeals, Third Circuit.

323 & 324 [Endorsed:] 575—29,125. United States Circuit Court of Appeals for the Third Circuit. Commercial Trust Company of New Jersey, Appellant, against Thomas W. Miller, as Alien Property Custodian, Appellee. Citation. Fisk & Fisk, Solicitors for Appellant, 15 Exchange Place, Jersey City, New Jersey. Service of a copy of the within citation is hereby admitted this — day of August, 1922.

325 [Endorsed:] File No. 29,125. Supreme Court U. S., October Term, 1922. Term No. 575. Commercial Trust Company of New Jersey, Appellant, vs. Thomas W. Miller, as Alien Property Custodian. Citation and Proof of Service. Filed Sept. 16, 1922.

Endorsed on cover: File No. 29,125. U. S. Circuit Court Appeals, 3rd Circuit. Term No. 575. Commercial Trust Company of New Jersey, appellant, vs. Thomas W. Miller, as Alien Property Custodian. Filed September 2nd, 1922. File No. 29,125.